TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917

No. [redacted] 157

H. B. TALLEY, PLAINTIFF IN ERROR,

vs.

DANIEL S. BURGESS AND J. L. HARNAGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED APRIL 26, 1918.

(25,260)

(25,260)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 463.

H. B. TALLEY, PLAINTIFF IN ERROR,

vs.

DANIEL S. BURGESS AND J. L. HARNAGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1 Filed Apr. 10, 1916. William M. Franklin, Clerk.

The Supreme Court of the State of Oklahoma.

No. 4328.

H. B. TALLEY, Plaintiff in Error,
vs.
DANIEL S. BURGESS et al., Defendants in Error.

Præcipe for Record.

It is hereby stipulated and agreed by and between Haskell B. Talley, heretofore referred to herein as "H. B. Talley" plaintiff in error, and Luther James, solicitor for the defendants in error, that the following instruments, documents, proceedings and pleadings shall be incorporated into the Transcript of Record on the Writ of Error in the above cause to the United States Supreme Court, with the Opinion of the Supreme Court of Oklahoma annexed:

1. Amended petition with exhibit filed in trial court.
2. Order of trial court appointing J. L. Harnage, guardian Ad Litem of defendant, Daniel S. Burgess.
3. Disclaimer of Defendant, J. L. Harnage, filed in trial court.
4. Motion by defendant, Daniel S. Burgess, for judgment on the pleadings filed in trial court.
5. Journal entry of the trial court.
6. Petition in Error to the Supreme Court of Oklahoma.

HASKELL B. TALLEY,
Plaintiff in Error.
LUTHER JAMES,
Solicitor for Defendants in Error.

2 In the Supreme Court of the State of Oklahoma.

No. 4328.

H. B. TALLEY, Plaintiff in Error,
vs.
DANIEL S. BURGESS et al., Defendants in Error.

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3 In the District Court in and for the Twenty-first Judicial District of Oklahoma, Tulsa County, Sitting at Tulsa.

H. B. TALLEY, Plaintiff,
vs.
DANIEL S. BURGESS, Minor, and J. L. HARNAGE, Defendants.

No. 1715.

Amended Petition.

Comes now the plaintiff, and, leave of this Honorable Court being first had and obtained, files this his amended petition herein and for his cause of action against the defendants herein sets forth the following:

One. That the plaintiff and the defendants herein are residents of the County of Tulsa, Oklahoma, and that the defendant, Daniel S. Burgess, is a minor.

Two. That on May 11, 1906, the plaintiff as agent for and as one of the partners of the copartnership of Talley & Harnage made a contract with Nora B. Burgess, the duly appointed, qualified and acting guardian of Daniel S. Burgess, whereunder and whereby the said defendant, Daniel S. Burgess, was to give to the plaintiff herein for the firm of Talley & Harnage a one-half interest in and to the interest of the said Daniel S. Burgess in the East one-half of the Northeast quarter of the Southeast quarter and the Northeast quarter of the Southeast quarter of the Southeast quarter of Section 35, Township 20 North, Range 12 East, in consideration of the legal services theretofore and thereafter to be performed by the plaintiff herein and by the firm of Talley & Harnage, lawyers, and that the plaintiff herein and the firm of Talley & Harnage performed all of the services agreed to be performed under said contract of May 11, 1906, in strict conformity to said contract and through and by reason of and as a result of said services the title to the above described land was acquired by the defendant, Daniel S. Burgess, and was confirmed in said

4 Burgess, and that said Burgess, at the time of the filing of this suit, was in possession of said premises and the holder of the legal title thereto and had ratified, adopted and confirmed the said contract of May 11, 1906, and accepted all of the benefits under said contract of the services of the plaintiff herein and of the firm of Talley & Harnage rendered as aforesaid.

Two and one-half. That on the same date and at the same place this plaintiff, as agent for and as one of the partners of the copartnership of Talley & Harnage, made and entered into contracts identical with the contract entered into as aforesaid with Daniel S. Burgess, with all the other heirs, both minors and adults, of said John S. Burgess, and that said contracts were then and there signed and delivered by each and every of said heirs of the said John S. Burgess.

Three. That your petitioner and the firm of Talley & Harnage have fully performed all of the conditions of said contract, a copy

of which is attached hereto, marked Exhibit "A" and asked to be made a part of this petition, but that the said Daniel S. Burgess has refused and continues to refuse to perform the obligations binding upon him in and under said contract and has refused to convey to the plaintiff for the firm of Talley & Harnage the one-half interest of the defendant, Daniel S. Burgess, in and to the above described property and has wholly failed to compensate the plaintiff and the firm of Talley & Harnage for any of the legal services performed under said contract and as set forth in said contract.

Four. That the firm of Talley & Harnage was dissolved by mutual consent on June 30, 1907, and that the plaintiff has requested the defendant Harnage to join with the plaintiff in carrying out the terms of said contract of May 11, 1906, and has requested the said Harnage to join with the plaintiff in obtaining the fees of said firm and of your petitioner for the services rendered to the defendant, Daniel S. Burgess, but that the said Harnage has refused and continues to refuse to assist the plaintiff in carrying out the terms of said contract and refused and continues to refuse to join with the plaintiff in this action.

Wherefore, the plaintiff sues the defendants and asks this Honorable Court that the plaintiff be given and decreed a one-half interest in the above described property as trustee of the firm of Talley & Harnage and that said land be partitioned, and for his costs in this suit, and such other relief as to the Court may seem meet and proper.

H. B. TALLEY.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Subscribed and sworn to before me on this the 16th day of June, 1910.

[SEAL.] LOLO CARR HILLER,
Notary Public.

My Commission Expires Oct. 16, 1913.

EXHIBIT "A."

Filed *only* May 12, 1906, at 8:00 A. M. File 11560.

Contract Between Attorney and Client.

This contract, made and entered into on this the 11th day of May, 1906, by and between Daniel S. Burgess, minor, by Nora B. Burgess, guardian, party of the first part, and Talley & Harnage, lawyers, party of the second part, both parties being residents of Tulsa, I. T., Witnesseth:

Whereas the party of the first part is one of the heirs and the only minor heir of John S. Burgess, deceased, a Cherokee by blood, and Nora B. Burgess has been duly appointed, qualified and is now acting as guardian of the person and estate of said minor, and the other

heirs of said deceased are Nora B. Burgess, widow, who was
6 elected to take a child's part in lieu of dower, Carrie V. Hanson, daughter, and Alma V. Gipson, daughter; and

Whereas, the said John S. Burgess died seized and possessed of certain improvements on land situate North and adjoining the townsite of Tulsa, I. T., said land containing eighty-nine and thirty-five one hundredths (89.35) acres, subject to allotment by the said deceased by reason of and because of the fact that the improvements on said property belonged to said deceased and said land being more particularly described as follows: N. E./4 of the S. E./4 and N./2 of the S. E./4 of the S. E./4 and lot 7 in section 35, township 20 North, range 12 East of the Indian Principal Meridian, and said land being filed on by said Nora B. Burgess an adopted white citizen of the Cherokee Nation; and

Whereas the rights of said Nora B. Burgess to allotment in the Cherokee Nation are now being litigated and a decision thereon pending in the Supreme Court of the United States, and said decision will in all probability be adverse to said Nora B. Burgess; and

Whereas, said John S. Burgess had prior to his death been induced by fraud to make deed to certain property situate in North Tulsa, Cherokee Nation, the description of said property being as follows: Lots 1, 2, 3, and 6 in block 5; lots 1, 2, 3, and 6 in block 4, and lot 1 in block 11, according to the official plat of North Tulsa, Indian Territory; and

Whereas said party of the second part has successfully terminated an appeal to the Honorable Secretary of the Interior, the decision of the Honorable Secretary, dated May 2, 1906, authorizing and directing the said Nora B. Burgess, as representative of the estate of John S. Burgess, deceased, to cancel the filing heretofore made by her as an individual upon said N. E./4 of the S. E./4 and N./2 of the S. E./4 of the S. E./4 and lot 7, in section 35, township
7 20 north, range 1 east, and file thereon her husband's rights, all contracts for the transfer and leasing of said land being declared null and void; and

Whereas, said party of the first part is desirous of setting aside the fraudulent contract and deed made by said John S. Burgess, prior to this death, to W. T. Brady and R. C. Brady, for city property above described, and has engaged the party of the second part to take the necessary legal steps for setting aside said contract and transfer and the party of the second part has agreed to give their services for these purposes; and

Whereas, the party of the second part has been engaged by the party of the first part to partition all of the real estate which said John S. Burgess owned or was entitled to at law or in equity, and to furnish said party of the first part all and such other legal services in the premises as may be necessary in the final winding up of the estate of said John S. Burgess, deceased, and all and such other services as may be necessary in safeguarding the interests and the estate of said minor during his minority; and

Whereas, said party of the first part has hereby engaged the party of the second part to act as his attorney in fact in the platting and

selling and transferring of said land heretofore embraced in the allotment of said Nora B. Burgess and said city property embraced in the fraudulent deed above set forth, said power of attorney being coupled with an interest and said power being hereby expressly accepted by the party of the second part, and the duties imposed therein hereby expressly assumed by said party of the second part:

Now, therefore, the party of the first part covenants and agrees, for himself his heirs, executors, administrators and assigns, to give to the said party of the second part, in consideration of the above agreement, and of the duties above assumed by the party of the second part, a one-half interest in all of the property passed by
8 and through said fraudulent transfer to W. T. Brady and R. C. Brady, which may be recovered from said grantees, their heirs, executors, administrators or assigns, and a one-half interest in the land formerly embraced in the allotment of Nora B. Burgess, and now embraced in the allotment of John S. Burgess, deceased.

The party of the first part hereby expressly covenants and agrees, for himself, his heirs, executors, administrators, and assigns, to faithfully perform his part of this contract, and that all powers herein granted to said party of the second part are binding and irrevocable.

The party of the second part hereby binds itself, its successors and assigns, to perform to the best of its ability all the duties herein imposed and assumed.

In witness whereof, the parties hereto have signed their names and attached their seals on this the 11th day of May, 1906.

NORA B. BURGESS. [SEAL.]
TALLEY & HARNAGE. [SEAL.]
By H. B. TALLEY.

Witnesses:
DAISY CLARK.
E. MILTON LATIMER.

Thereafter, on August 28, 1911, the defendant J. L. Harnage filed in said cause his disclaimer, in words and figures following:

STATE OF OKLAHOMA,
County of Tulsa:

In the District Court.

H. B. TALLEY, Plaintiff,
vs.
DANIEL W. BURGESS and J. L. HARNAGE, Defendants.

Disclaimer.

Comes now the defendant J. L. Harnage, and disclaims any right, title or interest in and to the lands described in the plaintiff's petition, and says that the land described in said petition is the property of the Kirkpatrick Heights Company, a corporation.

J. L. HARNAGE.

9 In the District Court in and for the Twenty-first Judicial District of Oklahoma, Tulsa County.

No. 1715.

H. B. TALLEY, Plaintiff,
vs.
DANIEL S. BURGESS, a Minor, and J. L. HARNAGE, Defendants.

Order of Court.

This cause coming on to be heard on this 30th day of June, 1911, upon the motion of H. B. Talley, attorney of record for the plaintiff, to have a guardian ad litem appointed for the defendant, Daniel S. Burgess, said Daniel S. Burgess and J. L. Harnage, defendants, being represented by J. L. Harnage, attorney, and the Court being fully advised in the premises, and being satisfied that a guardian ad litem should be appointed for said defendant, Daniel S. Burgess.

It is hereby ordered that J. L. Harnage be and he hereby is appointed guardian ad litem for said Daniel S. Burgess, to represent said defendant and to prosecute his defense in said cause.

L. M. POE, *Judge.*

Endorsed: No. 1715. Talley vs. Burgess. Compared. Order. District Court, State of Oklahoma, County of Tulsa. Filed Jun- 8, 1911. W. W. Stuckey, District Clerk. Entered June 30 1911. Court record 5, page 571.

10 Thereafter, on March 6, 1912, the defendants filed in said cause a motion, in words and figures as follows:

STATE OF OKLAHOMA,
County of Tulsa:

In the District Court.

H. B. TALLEY, Plaintiff,
vs.
DANIEL S. BURGESS, a Minor, and J. L. HARNAGE, Defendants.

Motion.

The defendants object to the plaintiff introducing any evidence upon the trial of this case for the following reasons:

1.

Because the plaintiff's pleadings and exhibits show that the contract sued upon is void and was void from its execution for the reason that it is contrary to section 14 Cherokee Agreement, 32 Volume U. S. Statutes page 716.

2.

Because it does not appear from the pleadings and exhibits in the case that the contract sued upon was executed in conformity with the provisions of the law governing the sales of minor's lands in force in Indian Territory at the time said contract was made; and to enforce this contract against said Daniel S. Burgess would deny him the protection of Section 22 of an act of Congress approved by the President on April 26, 1906, entitled "An act to provide for the final disposition of the affairs of the Five civilized Tribes in Indian Territory, and for other purposes", in this that it would make effective a contract of sale by a guardian of the minor's real estate without an order of a proper court, duly made upon a petition filed by the guardian, first directing such sale.

3.

Because the plaintiff's pleadings and exhibits show a liability for professional services if one rests anywhere by reason of said contract, against the guardian and not against the land of Daniel S. Burgess.

11

4.

Because the pleadings and exhibits in this case show that the contract sued upon is void as against the public policy of the United States, and the common law as administered in Indian Territory at the time said contract was made in this that said contract is champertous, and is an attempt to give part of any allotment by a guardian of an Indian minor to secure such allotment, and for the further reason that the property, the subject matter of said suit was not in the possession of Daniel S. Burgess or any one for him at the time said contract was made.

5.

Because, under equity as administered in this jurisdiction the plaintiff has no such contract as appears from his pleadings and exhibits, which will be specifically enforced.

6.

Because the pleadings and exhibits do not show that the plaintiff or the firm of Talley and Harnage had the authority and were duly licensed and empowered to practice law in the courts and before the departments of the Interior Department of the Government where said land was in litigation.

Wherefore the defendants ask the court to enter judgment for the defendants upon the pleadings and exhibits, dismissing the plaintiff's petition and for cost.

LUTHER JAMES,
Attorney for Defendants.

Thereafter, on March 11, 1912, there was filed in this cause a Journal Entry, in the following words and figures:

In the District Court in and for the Twenty-first Judicial District of Oklahoma, Tulsa County.

No. 1715.

H. B. TALLEY, Plaintiff,
vs.
DANIEL S. BURGESS et al., Defendants.

Journal Entry.

12 This cause coming on to be heard on this the 6th day of March, 1912, same being a regular Court day of the March, 1912, Term of said Court, in its regular order, upon the pleadings heretofore filed herein, and upon the motion this day filed by the defendants for judgment on the pleadings, plaintiff being represented by N. A. Gibson and H. B. Talley, and defendants being represented by L. J. Martin and Luther James, the Court having heard argument upon said motion for judgment on the pleadings, and being fully advised in the premises, finds:

1. That the contract of May 11, 1906, between Talley & Harnage, by H. B. Talley, and Nora B. Burgess, guardian of Daniel S. Burgess, attached to plaintiff's amended petition as Exhibit A, was void, for the reason that said contract was an attempt to alienate or incumber restricted lands of an allottee in the Cherokee Nation or Tribe of Indians.

2. That said contract was in contravention of the terms of the Cherokee Treaty, 32 Stats. 716, and in contravention of the terms of the Act of Congress of April 26, 1906, 34 Stats. 145.

3. That on the above and foregoing grounds the defendant's motion for judgment on the pleadings herein should be and is sustained.

Wherefore, it is ordered, adjudged and decreed that the plaintiff take nothing under the said contract of May 11, 1906, and that this cause be and the same is hereby dismissed. To all and singular of which rulings plaintiff then and there duly excepted.

The plaintiff is allowed sixty days from this date in which to make and serve case-made, the defendants allowed ten days in which to suggest amendments, case-made to be closed upon five days' notice thereafter by either party.

L. M. POE, *Judge.*

13 In the Supreme Court of the State of Oklahoma.

No. 4328.

H. B. TALLEY, Plaintiff in Error,
vs.
DANIEL S. BURGESS et al., Defendants in Error.

Petition in Error.

H. B. Talley, plaintiff in error, complaining of the judgment rendered herein by the trial court on the sixth day of March, 1912, alleges and shows to this Honorable Court that on said last mentioned date the District Court in and for the 21st Judicial District of Oklahoma, Tulsa County, sitting at Tulsa, rendered judgment in the above entitled cause in favor of the defendants in error, Daniel S. Burgess, a minor, and J. L. Harnage, wherein and whereby it was decreed that the plaintiff below for himself and for the copartnership of Talley and Harnage take nothing by his said suit and take nothing under the contract in said cause sued upon, said contract being made by and between this plaintiff in error for and in behalf of himself and the copartnership of Talley and Harnage, and the defendant in error, Daniel S. Burgess, a minor, said contract being made on May 11, 1906, and that said cause be dismissed at the cost of the plaintiff below in a certain suit in which this plaintiff in error was plaintiff and these defendants in error were defendants in the above mentioned court, a case-made containing a record of said cause in said court being attached hereto and made a part of this petition in error.

The plaintiff in error alleges that there is error in said judgment and proceedings in this, to-wit:

1.

That the trial court erred in holding that the contract of May 11, 1906, between Talley and Harnage by H. B. Talley and Nora B. Burgess, as Guardian of Daniel S. Burgess, attached to plain-
14 tiff's petition as Exhibit A, was void for the reason that said contract was an attempt to alienate or incumber restricted land of an aliottee of the Cherokee Nation or Tribe of Indians.

2.

That the trial court erred in holding that said contract was in contravention of the terms of the Cherokee Treaty (32 Stats. at Large 716).

3.

That the trial court erred in holding that said contract was in contravention of the terms of an Act of Congress of April 26, 1906 (34 Stats. at Large 145).

4.

That the trial court erred in holding that the defendants' motion for judgment on the pleadings herein should be sustained.

5.

That the trial court erred in holding that the plaintiff below take nothing under said contract of May 11, 1906, and in dismissing said cause at the cost of said plaintiff.

6.

That the trial court erred in rendering final judgment herein against the plaintiff below and in favor of the defendants below on the motion for judgment on the pleadings when said cause was pending and ready for trial on the plaintiff's amended petition, said amended petition not being traversed or challenged by the defendants below, and no answer or demurrer being filed against said amended petition by said defendants, or either of them.

7.

That the trial court erred in rendering final judgment herein against the plaintiff below and in refusing to grant said plaintiff any relief whatever under his said amended petition.

15 8.

That the trial court erred in rendering final judgment herein against the plaintiff below and in favor of the defendants below.

Wherefore plaintiff in error prays that the judgment rendered herein by the trial court against the plaintiff in error be reversed at the cost of the defendants in error and that this case be remanded to the trial court with instructions to proceed therewith in accordance with the mandate of this court.

HASKELL B. TALLEY.
Solicitor for Plaintiff in Error.

Filed Sept. 2, 1912. W. H. L. Campbell, Clerk.

15½ And thereafter, at the April Term, 1915, of said Supreme Court of the State of Oklahoma, on the 18th day of May, 1915, the following proceeding was had in said cause, to wit:

#4328.

H. B. Talley, Plaintiff in Error,
vs.
Daniel S. Burgess et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the above cause should be affirmed.

Opinion by Brewer, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

16 Thereafter, on May 18, 1915, the Supreme Court of the State of Oklahoma rendered its decision in said cause, affirming the judgment of the trial court, the opinion of the Supreme Court of Oklahoma being in the words and figures following, to-wit:

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division No. 1.

No. 4328.

H. B. TALLEY, Plaintiff in Error,
vs.
DANIEL S. BURGESS et al., Defendants in Error.

Syllabus.

1. A contract of sale, made by a guardian of a Cherokee Indian minor, prior to statehood, but after the approval of the Act of Congress of April 26, 1906, (34 Stat. at L., 137) and prior to that of May 27 1908 (— Stat. at L. —) of inherited lands allotted to his father, there being adult heirs, and without an order of court "made upon petition filed by (the) guardian," is void.

2. Section 22 of an Act of Congress approved April 26, 1906, (34 Stat. at L. 137) provides its own special procedure, when it is desired that a minor join with the adult heirs in the sale of an inherited allotment; and prior to statehood, such purpose could only be accomplished through the action of "a guardian, duly appointed by the proper United States court for the Indian Territory, * * * upon order of such court made upon petition filed by guardian."

Error from the District Court of Tulsa County—L. M. Poe, Judge.

Affirmed.

Filed May 18, 1915. William M. Franklin, Clerk.

17 Haskell B. Talley, Pro Se.: Luther James, Attorney for Defendants in Error.

Opinion of the Court by

BREWER, *C.*:

H. B. Talley, as plaintiff below, brought this suit for the specific performance of a contract, against Daniel S. Burgess, a Cherokee

Indian minor. The contract sought to be enforced was executed by Nora B. Burgess, mother and legal guardian of defendant. By its terms, the law firm of Talley & Harnage was employed to represent the interests of the minor in various legal matters, and especially to procure the cancellation of the allotment of certain lands near Tulsa, allotted to defendant's mother, an intermarried Cherokee, and to procure the allotment of the same in the name of defendant's father, at the time deceased. This seems to have been accomplished.

The contract provided that for the services rendered and to be rendered, the attorneys should have "a one-half interest in the lands formerly embraced in the allotment of Nora B. Burgess, and now embraced in the allotment of John S. Burgess, deceased." The contract was executed May 11, 1906. The lands involved were allotted, after his death, to John S. Burgess, father of defendant. There were also adult heirs of the allottee. The contract was not authorized or approved by any court. Mr. Harnage refused to join in the suit against the minor, and was, for that reason, made a defendant. After suit was brought, he filed a disclaimer of any right or interest under the contract. The prayer of the petition was that plaintiff "be decreed a one-half interest in the above described property," etc.

Defendant filed a plea, denominated a motion, objecting to the introduction of any evidence, and asking judgment on the pleadings, setting out six special reasons therefor. One of the grounds
18 follows:

"Because it does not appear from the pleadings and exhibits in the case that the contract sued upon was executed in conformity with the provisions of the law governing the sales of minors' lands, in force in Indian Territory at the time said contract was made; and to enforce this contract against said Daniel S. Burgess would deny him the protection of Section 22 of an Act of Congress, approved by the President on April 26, 1906, entitled, 'An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and for other purposes,' in this, that it would make effective a contract of sale by a guardian of the minor's real estate without an order of a proper court, duly made upon a petition filed by the guardian, first directing such sale."

This plea, though denominated a motion, was in all its essentials a demurrer, and will be treated as such. The court sustained the demurrer and entered judgment for defendant, evidently on the ground that the contract was illegal and unenforceable. The court was correct in its holding.

The contract was a sale, or agreement to sell, on May 11, 1906, one-half of a minor heir's interest in an allotment made in his father's name, but after his death. There were adult brothers and sisters living. Inasmuch as this attempted alienation of a minor's inherited lands was made after the passage of the act of April 26, 1906, and prior to that of May 27, 1908, the validity of the contract is to be determined by the provisions of the former act, and especially section 22 thereof, which reads:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed

or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

To sustain his contract, plaintiff construes this section as meaning that a guardian, prior to statehood, had the power to join with the adult heirs in a sale of his ward's interest in an inherited
19 allotment, without petitioning the court to be allowed to do so, and without any court action in the matter; and to arrive at this construction, an elaborate analysis is attempted of the various sentences and clauses of the section. Plaintiff cites and seems to rely upon the case of Wilson v. Morton, 29 Okl. 745, which case, so far as called to our attention, or as we have found, is the only case directly in point. We disagree with counsel as to the effect of that case on his proposition. It is true, in the Wilson case, supra, the conveyance was made since statehood, yet every word of that case, when it is fairly considered, leads to the conclusion that a guardian, prior to or after statehood, could only join with the adult heirs in a sale of his ward's inherited lands, upon "an order of court made upon petition filed by (the) guardian." In that case, it is said:

"There can be no doubt as to what Indian minors may, under its provisions, sell their inherited lands, or when they can sell. As to how the sale shall be made, the Act provides that it shall be by the guardian, duly appointed, upon order of the court, and that the order of court shall be made upon petition filed by the guardian. The procedure prescribed by the Act itself seems to us complete."

We shall not go over the ground so well covered in the Wilson case, supra, in which pains are taken to show that Section 22 contains its own procedure. The general laws in force in the Indian Territory relating to the sale of minors' lands does not apply, because the section contains its own special procedure, and to apply the general law would defeat the intention of Congress and almost inevitably work to the disadvantage of the minor, whose interests were intended to be safe-guarded. If the court had for a moment believed that a guardian in Indian Territory could act, independent of the United States Court, it certainly would not have wasted so much time and so many words in a discussion of why the general law did not, and the special procedure found in the Act, did apply.

20 We therefore hold that under section 22, supra, a guardian desiring to sell his ward's interest, by joining the adult heirs in the sale of an inherited Indian allotment, prior to statehood, could only do so under an order of the proper United States court, upon

a petition to be allowed so to do; and that a sale of such an interest by the guardian, independent of court action, was and is void.

It follows that the contract in suit, being illegal, the court had no power to require its specific performance, or to charge the land of this minor in any way because of it.

The cause should be affirmed.

May 18, 1915. By the Court: Adopted in whole.

21 The Supreme Court of the State of Oklahoma.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages, numbered A to S, inclusive, are a true, full and complete transcript of the record and proceedings in the case of H. B. Talley, plaintiff, vs. Daniel S. Burgess, et al., defendants, heretofore decided in this Court, as requested in precipe for record, filed herein, and also of the opinion of the Supreme Court of the State of Oklahoma rendered herein, as the same now appear on the files in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Court at my office in Oklahoma City, Oklahoma, on this the 14" day of April, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of Oklahoma.

22 Filed Apr. 10, 1916. William M. Franklin, Clerk.

In the Supreme Court of the United States.

No. —.

H. B. Talley, Plaintiff in Error.
vs.
Daniel S. Burgess et al., Defendants in Error.

Assignment of Errors.

And now on this 10th day of April, 1916, comes the petitioner pro se and says that the decree entered in the above cause in the Supreme Court of the State of Oklahoma on the 18th day of May, 1915, is erroneous and unjust to this petitioner, plaintiff in error in said court, in this:

1. That the Supreme Court of the State of Oklahoma committed error in law and erroneously construed a statute of the United States contrary to the right and title of this petitioner in the subject matter of this suit as claimed by this petitioner in the Supreme Court of the State of Oklahoma, when said court held that the contract executed and delivered to this petitioner on May 11, 1906, by the defendant,

Daniel S. Burgess, through his lawful guardian was contrary to Sec. 20, Act of Congress of July 1, 1902 (32 Stat. at L. p. 716).

2. That the Supreme Court of Oklahoma committed error in law and erroneously construed a statute of the United States contrary to the right and title of this petitioner in holding that the allotment of John S. Burgess, an one fourth blood citizen of the Cherokee Nation filed, made and patented to the heirs of John S. Burgess after the death of said allottee, in accordance with the provisions of Sec. 20 Act of Congress of July 1, 1902, (32 Stat. at L. p. 716), but
23 before May 11, 1906, was restricted (Indian) land.

3. That the Supreme Court of the State of Oklahoma committed error in law and erroneously construed a statute of the United States contrary to the right and title of this petitioner in holding that the contract of May 11, 1906, executed by the defendant, Daniel S. Burgess, through his lawful guardian in favor of the said H. S. Talley, said contract binding said Burgess through his guardian to convey an one half interest in said allotment to said Talley, said contract being made after said allotment had been perfected, was void and in controversion of the terms of Sec. 22, Act of Congress of April 26, 1906, (34 Stat. at L. p. 137).

4. That the Supreme Court of the State of Oklahoma committed error in law and erroneously construed a statute of the United States, contrary to the right and title of this petitioner, in holding that a contract for legal services, made by the lawful guardian of a Cherokee Indian minor of the one eighth blood on May 11, 1906, with a duly licensed and practicing attorney at law to bind a Cherokee allotment inherited by such minor from his father and allotted after the death of such ancestor but before May 11, 1906, to the heirs of such father, there being other adult heirs of such deceased allottee, and such heirs joining with said minor in said contract for attorney's fees, such contract not being made upon petition filed by the guardian of such minor with the proper probate court and not being approved by the probate court having jurisdiction of the estate of such minor, and of the estate of such deceased allottee, was void.

24 5. That the Supreme Court of the State of Oklahoma committed error in law and erroneously construed a statute of the United States contrary to the right and title of this petitioner, in holding that Sec. 22 of Act of Congress approved April 26, 1906 Supra, provided the sole and only procedure for the alienating or binding of lands of a deceased one fourth blood Cherokee, duly allotted in the Cherokee Nation in the name of the heirs of deceased allottee, where such allottee died prior to receiving his allotment, where such allotment was made prior to May 11, 1906, and where such minor heir joined with all adult heirs of such deceased allottee in contracting on May 11, 1906, to transfer one half of such allotment to a duly licensed and practicing attorney as an attorney fee.

Wherefore, This petitioner, plaintiff in error in the Supreme Court of the State of Oklahoma, prays that the said judgment of the Supreme Court of Oklahoma entered in this cause on May 18, 1915, be reversed, and the Supreme Court of the State of Oklahoma directed to reverse the decree of the trial court, the District Court of the

Twenty-first Judicial District of the State of Oklahoma, Tulsa County, entered herein on the 6th day of March, 1812, against this petitioner, with instructions to the Supreme Court of the State of Oklahoma to direct the said trial court to proceed with the trial of said cause in accordance with the opinion of this court and to enter such decree as this petitioner upon his bill may be entitled to, and petitioner be given his costs.

HASKELL B. TALLEY,
Solicitor Pro Se.

25 Filed Apr. 10, 1916. William M. Franklin, Clerk.

The Supreme Court of the United States.

No. —.

H. B. TALLEY, Plaintiff in Error,
vs.
DANIEL S. BURGESS et al., Defendants in Error.

Petition for Writ of Error.

To Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Comes now H. B. Talley, appellant in the above cause, plaintiff in the trial court, who would show unto this Honorable Court that in the record, proceedings and rendition of the final decree of May 18, 1915, in the above cause by the Supreme Court of the State of Oklahoma, that Court being the highest Court in said state in which a decision could be had in the said cause between H. B. Talley and said Daniel S. Burgess, et al., manifest error, as is particularly shown in the Assignment of Error which is herewith, has occurred greatly to his damage, whereby petitioner feels aggrieved:

Wherefore, Your petitioner prays for a writ of error to the Supreme Court of the United States; that the transcript of the record, proceedings and papers upon which the orders in said cause were made and the final judgment therein rendered by the Supreme Court of the State of Oklahoma, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such cases made and provided; and that the same be inspected and corrected as is provided by law, so that justice may be done.

HASKELL B. TALLEY,
Solicitor Pro Se.

26 Filed Apr. 10, 1916. William M. Franklin, Clerk.

The Supreme Court of the United States.

No. —.

H. B. TALLEY, Plaintiff in Error,
vs.
DANIEL S. BURGESS et al., Defendants in Error.

Order Allowing Petition for Writ of Error.

On this 10 day of April, 1916, came on to be heard the petition of H. B. Talley for a writ of error to the Supreme Court of the United States and the petition is granted.

Let the writ of error issue upon the executing by the plaintiff in error of bond to the defendants in error in the sum of One thousand dollars.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Attest:
WM. M. FRANKLIN, *Clerk.*
By N. C. ORR, *Deputy.*

27 Filed Apr. 10, 1916. William M. Franklin, Clerk.

In the Supreme Court of the United States.

No. —.

H. B. TALLEY, Plaintiff in Error,
vs.
DANIEL S. BURGESS et al., Defendants in Error.

Bond.

Know all men by these presents: That H. B. Talley, as principal and Herschel Borochoff and J. Truman Nixon as sureties, of the City of Tulsa, County of Tulsa, and State of Oklahoma, are held and firmly bound unto the above named Daniel S. Burgess and J. L. Harnage in the sum of One thousand ($1,000.00) Dollars, to be paid to the said Daniel S. Burgess and J. L. Harnage for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals on this 10th day of April, 1916, in the 131st year of the Independence of the United States.

The condition of the above obligation is such whereas the above named H. B. Talley has prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered in the above entitled cause by the Supreme Court of the State of Oklahoma on May 18, 1915.

Now therefore, if the above named H. B. Talley shall prosecute an appeal to effect and answer all costs if he fails to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

H. B. TALLEY, [SEAL.]
Principal.
HERSCHEL BOROCHOFF.
J. TRUMAN NIXON, [SEAL.]
Sureties.

28 STATE OF OKLAHOMA,
County of Tulsa, ss:

Herschel Borochoff and J. Truman Nixon sureties on the within bond, being first duly sworn on oath, state:

Each for himself that he is a resident and free holder of the County of Tulsa, State of Oklahoma, and that he is worth over and above all his just liabilities and exemptions the sum set opposite his name below. That is to say:

I, Herschel Borochoff am worth Two thousand ($2,000.00) Dollars.

I, J. Truman Nixon am worth Two thousand ($2,000.00) Dollars.

HERSCHEL BOROCHOFF.
J. TRUMAN NIXON.

Subscribed and sworn to before me this 5th day of March, 1916.

[SEAL.] S. S. BASSETT,
Notary Public.

My Commission Expires 2-23-1920.

The within bond examined and approved this 10 day of April, 1916.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

29 Filed Apr. 10, 1916. William M. Franklin, Clerk.

Writ of Error.

The President of the United States to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said Court before you, or some of you, between H. B. Talley, plaintiff in error, and Daniel S. Burgess, et al., defendants in error, your Court being the highest court

in said state having jurisdiction to render judgment in said cause, there was drawn in question Sec. 22, Act of Congress of April 26, 1906, (34 Stat. at L., p. 137) and Sec. 20, Act of Congress of July 1, 1902, (32 Stat. at L., p. 617), and the decision was against the right and title of the plaintiff in error, said Court necessarily construing in connection with said statute the right and title of the plaintiff in error to the subject matter of said cause of action and there being manifest error in said decision greatly to the damage of H. B. Talley, the plaintiff in error, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given that under the seal of your Court you send the record and proceedings had in said — to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof, in the Supreme Court, then and there held, so that the record may be inspected by said Court and justice done.

Witnesseth: The Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 10th day of April, 1916.

ARNOLD C. DADE,
Clerk of the United States District Court
for the Western District of Oklahoma.

[Seal United States District Court, Western District of Oklahoma.]

Allowed April 10, 1916.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

30 Filed Apr. 12, 1916. William M. Franklin, Clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Daniel S. Burgess and J. L. Harnage:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Oklahoma, wherein H. B. Talley is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned should not be corrected and why speedy justice should not be done plaintiff in error in that behalf.

Witnesseth: The Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 10 day of April, 1916,

in the One Hundred and Thirty first year of the Independence of the United States.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

Attest:
W. M. FRANKLIN,
Clerk of the Supreme Court of Oklahoma,
By N. C. ORR, *Ass't.*

[Seal Supreme Court, State of Oklahoma.]

I, Luther James, Solicitor of record for the defendants in error in the above entitled cause, hereby acknowledge service of the above citation and enter appearance in the Supreme Court of the United States.

LUTHER JAMES,
Solicitor for the Defendants in Error.

31 The Supreme Court of the State of Oklahoma.

Certificate.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that there was lodged with me, as such clerk, on the 10" day of April, 1916, in the case of H. B. Talley, plaintiff, vs. Daniel S. Burgess, et al., defendants, a case heretofore decided in this Court, the following documents:

1. The original bond for appeal to the Supreme Court of the United States, a copy of which is herein set forth.
2. Copy of assignment of error with prayer for reversal.
3. Three copies of the Writ of Error, the original of which is herein set forth, one of said copies being for the files in this office and there being one copy for each of said defendants.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Court at Oklahoma City, Oklahoma, on this 14" day of April, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of Oklahoma.

32 The Supreme Court of the State of Oklahoma.

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause of H. B. Talley, plaintiff, vs. Daniel S. Burgess, et al., defendants, together with all proceedings heretofore had in said cause, as requested in precipe filed herein.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of Oklahoma in my office at Oklahoma City, Oklahoma, on this the 14" day of April, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of Oklahoma.

Costs of Proceeding.

Costs assessed against H. B. Talley, plaintiff, — Dollars which have been paid.

Costs assessed againt Daniel S. Burges, et al., defendant, — Dollars which have been paid.

____ ____,
Clerk of the Supreme Court of Oklahoma.

Endorsed on cover: File No. 25,260. Oklahoma Supreme Court. Term No. 463. H. B. Talley, plaintiff in error, vs. Daniel S. Burgess and J. L. Harnage. Filed April 25th, 1916. File No. 25,260.

FILED
APR 2 1917
JAMES D. MAHER
CLERK

No. 157

In the

Supreme Court of the United States

October Term, 1916

H. B. TALLEY, - - - - - - - Plaintiff in Error,

vs.

DANIEL S. BURGESS and J. L. HARNAGE,

Defendants in Error

In Error to the Supreme Court of the State of Oklahoma

HASKELL B. TALLEY,

Pro se.

Cockrell & Cockrell, Exclusive Law Brief Printers, 420 S. Boston, Tulsa, Okla.

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In the

Supreme Court of the United States

October Term, 1916

No. 463

H. B. TALLEY, - - - - - - - Plaintiff in Error,

vs.

DANIEL S. BURGESS and J. L. HARNAGE,

Defendants in Error

In Error to the Supreme Court of the State of Oklahoma

STATEMENT OF FACTS

This suit originated in the District Court for Tulsa County, Oklahoma, and, the trial court deciding adversely to the plaintiff, was appealed to the Supreme Court of the State of Oklahoma, and, the decision in that court being also adverse to the appellant, is now brought here by Writ of Error to the Supreme Court of that State.

Plaintiff in error bases his cause upon a contract

made on May 11, 1906, by the law firm of Talley and Harnage, composed of the plaintiff in error and J. L. Harnage, with Nora B. Burgess, mother and legal guardian of the defendant in error, Daniel S. Burgess. Harnage refusing to join Talley in the suit is made a party defendant. The plaintiff in error attempts to recover under the above contract an one-half of an one-third interest of the defendant in error, Burgess, in a Cherokee allotment as compensation for legal services. A selection of the lands embraced in the allotment in question was made by Nora B. Burgess, Administrator of the Estate of John S. Burgess, on May 2, 1906, John S. Burgess having died long prior to May 2, 1906, without having selected or having received patent for the land in question. Daniel S. Burgess, the defendant in error, was a Cherokee of less than half blood, his mother being what is commonly known as an intermarried citizen. Sometime after May 2, 1906, the allotment of John S. Burgess went to patent, and the share of Daniel S. Burgess in such land was set apart to him, this heir at the time of the initiation of this suit being in the possession and quiet enjoyment of his part of the allotment, to-wit:

> East one-half of northeast quarter, of southeast quarter and northeast quarter of southeast quarter of southeast quarter, section thirty-five, township twenty north, range twelve east.

Talley and Harnage on May 11, 1906, entered into contracts with all the other heirs of John S.

Burgess similar to those entered into with Daniel. Plaintiff in error having performed the services required under the contract of May 11, 1906, requested the defendant in error to execute that contract as to the terms thereof binding upon him. This Burgess declined to do (Transcript of Record pages 2, 3, 4 and 5.) The defendant in error filed a motion treated by the state courts as a demurrer under which it is sought to defeat the cause of action on the ground among others that the contract of May 11, 1906, is entered into contrary to the provisions of section 22 of the Act of Congress of April 26, 1906 (34 Stat. at L. p. 137). (Transcript of Record, pages 6 and 7). Both the trial court and the Supreme Court of Oklahoma looked favorably upon the demurrer and held that a guardian could not dispose of his ward's property "by joining the adult heirs in the sale of an inherited Indian allotment, prior to statehood," unless he should act "under an order of the proper United States court, upon a petition to be allowed so to do; and that a sale of such an interest by the guardian, independent of court action, was and is void." (Transcript of Record, pages 11 to 14 inclusive).

ASSIGNMENT OF ERRORS

1. The Supreme Court of Oklahoma erred in holding that the allotment of John S. Burgess, an one-fourth blood citizen of the Cherokee Nation, filed, made and patented in behalf of the heirs of

the deceased subsequent to the death of the allottee in accordance with the provisions of section 20, Act of Congress of July 1, 1902, (32 Stat. at L. p. 716), but before May 11, 1906, was restricted Indian land.

2. The Supreme Court of Oklahoma erred in holding that the contract of May 11, 1906, executed by the defendant in error, Daniel S. Burgess, through his lawful guardian in favor of the plaintiff in error, said contract binding said Burgess to convey to plaintiff a one-third interest in said inherited allotment, said contract being made after said land had been selected for allotment, was void and in contravention of the terms of section 22, Act of April 26, 1906 (34 Stat., 137).

3. The Supreme Court of Oklahoma erred in holding that section 22 of the Act of Congress of April 26, 1906, provided the sole procedure for the alienating or binding inherited allotted lands of a deceased one-fourth blood Cherokee Indian, where such land was selected for allotment after the death of the allottee, where such allotment was made prior to May 11, 1906, and where the minor heir joined with all adult heirs in contracting on May 11, 1906, and where the minor heir joined with all adult heirs to transfer one-half interest in such allotment to a practising attorney as an attorney's fee, and that under said procedure it was necessary that the guardian first file with the proper court a petition for the sale and obtain an order from such court authorizing the sale of said minor's interest.

LAWS OF CONGRESS TO BE CONSTRUED

The following Act of Congress is brought directly in question by the Supreme Court of Oklahoma in this case:

> That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe. (Section 22, Act of April 26, 1906).

The following Acts of Congress are indirectly brought in question by the issues involved:

> 11. There shall be allotted by the Commissioner to the Five Civilized Tribes and to each citizen of the Cherokee Tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and

ten acres of the average allotable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements * * *

13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him * * *.

14. Lands allotted to citizens shall not in any manner whatever at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

15. All lands allotted to members of said tribe, except such as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent * * *

20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in

his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. * * *(32 Stat. at L. p. 716).

19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act unless such restrictions shall, prior to the expiration of such period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, that such full-blod Indians of any of such tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided, further, that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to removal of restrictions, where patents thereafter issue, shall not be

deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinbefore provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: Provided, further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee (34 Stat. at L. page 137).

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: (Act of May 27, 1908, 35 Stat. at L. 312).

OUTLINE OF ARGUMENT

(I).

The allotment of John S. Burgess, an one-quarter blood Cherokee, father of the defendant in error, Daniel S. Burgess, having been selected on May 2, 1906, after the death of the allottee, descended to the heirs free of all federal restrictions, since such allotment was selected and patented under section 20 of the Cherokee Agreement ratified August 8, 1902,

and the restrictions contained in sections 13, 14 and 15 of said Agreement would not apply.

Mullen v. *United States*, 224 U. S. 448;

Skelton v. *Dill*, 235 U. S. 206;

Greenlees v. *Morris*, 239 U. S. 626;

Sunday v. *Mallory*, 237 Federal Rep. 526.

(II).

The Act of April 26, 1906, (34 Stat. at L. 137), particularly section 22 of said Act, did not intend to and did not reimpose restrictions upon lands allotted under section 20 of the Cherokee Agreement, and the defendant in error, Daniel S. Burgess, through his legal guardian could as freely alienate or bind for legal services his interest in the allotment of his father as he could non-tribal lands on May 11, 1906, and that said section 22 continued restrictions upon inherited tribal lands only where the allottee had selected for allotment his interest in the tribal lands or had received patent for such interest.

Tiger v. *Western Investment Co.*, 221 U. S. 286;

Mullen v. *United States*, 224 U. S. 448.

Bartlett v. *United States*, 235 U. S. 72, and *Atkins* v. *Arnold*, 235 U. S. 417;

Woodard v. *De Graffenried*, 238 U. S. 284;

Greenlees v. *Morris*, 239 U. S. 626;

Sunday v. *Mallory*, 237 Federal Rep. 526;

Welty v. *Reed*, 231 Federal Rep. 930;

Shulthis v. *McDougal*, 170 Fed. 529.

(III).

The plaintiff in error in the taking of the contract of May 11, 1906, from the legal guardian of the defendant in error, Burgess, as a method of securing compensation for his legal services, complied both with the letter and spirit of section 22 of the Act of April 26, 1906, if it should be held that such section imposed restrictions upon inherited Cherokee allotments where none theretofore existed, because said section did not require a deed to, or a contract to convey, a minor's interest in an inherited Cherokee allotment to be authorized or approved by a court or by any other official, except the minor's guardian, the guardian being required only to join with the other heirs in making such conveyances in all cases, except where the heirs were full-bloods.

ARGUMENT

Part One.

The treaties of the United States with the Cherokee Indians and the legislation of Congress with reference to Cherokee domain, the objects sought to be attained by these conventions and legislations and the policy of the Federal government generally to-

wards the Indian Tribes being fresh in the minds of many of the members of this Court, since recently decisions involving these matters have been handed down by this Court (See *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. pp. 413, 428; *Mullen* v. *United States*, 224 U. S. 448 and *Atkins* v. *Arnold*, 235 U. S. 417), we say briefly of these matters that the lands in question as a part of the Cherokee domain were "secured to the whole Cherokee people for their common use and benefit" (9 Stat. 871), this being done in pursuance of a deliberate plan adopted by the Federal government in full harmony with the expressed wishes of the Cherokees that they be removed and separated from the white people and that they be allowed to live upon and enjoy their lands in common. For over half a century the United States pursued its policy of non-interference; but during this period the Cherokees proved to themselves, as well as to the Federal government that ownership in common for a nation was Utopian, for the effort to attain this theoretically perfect condition for the fullest enjoyment of wealth resulted in the rich becoming richer and the poor poorer. An ever decreasing number were acquiring the possession, or the fruits of possession, of the tribal lands. There was a reversal of the policy of the Federal government and of the theory of the Cherokees as to the most practical way to enjoy the benefits of their tribal lands, and individual ownership resulted

(See particularly the Act of Congress of March 3, 1893), (27 Stat. 612, 645); Act of July 1, 1902 (32 Stat. 716); *Stephens v. Cherokee Nation*, 174 U. S. 445, 447-451). Concurrent, however, with the new plan of individual ownership was a desire on the part of the Federal government, not so pointedly expressed through legislation during the period the lands in question were held by the Indians as communal property, to protect the allottee or individual owner from his own inexperience and incompetence in the managing of his separate property (See sections 13, 14 and 15 of the Cherokee Treaty, *supra*, and similar provisions contained in contemporaneous allotment acts); but the extent of the restriction is carefully limited to the end to be accomplished: so, if an allottee is provided with sufficient land to afford him a livelihood, which he can not sell and which cannot be taken from him, other lands acquired by him, whether by purchase or by inheritance, may be freely aliened (See section 20, Cherokee Allotment Treaty, *supra*, and similar provisions contained in contemporaneous allotment acts). The reasons which Congress had in mind when it limited in certain instances the right of alienation do not justify the accumulating of many allotments in the hands of an incompetent or improvident person without the right to freely alienate. The iniquity resulting would not be less than when the strong and aggressive, possibly unscrupulous, person acquired more than his just share of the national do-

main prior to the allotment acts. Hence we find section 20 of the Cherokee Agreement, *supra*, provides that where one entitled to allotment dies before September 1, 1902, without receiving allotment, lands to which he would have been entitled, if living, shall descend to his heirs according to the laws of Arkansas; and the heirs, except in a few cases, would also be allottees, enjoying to the fullest extent the benefits to be derived from a restricted allotment. Applying these observations to our case we say that under the Cherokee Allotment Treaty, the heirs of John S. Burgess enjoying to the fullest extent allotments in their own right, Congress did not deem it necessary to restrict the alienation by them of the lands of their father, John S. Burgess, selected by his administrator for allotment after his death.

Mullen v. United States, 224 U. S. 448;
Skelton v. *Dill*, 235 U. S. 206;
Morris v. *Greenlees*, 239 U. S. 626;
Sunday v. *Mallory*, 237 Federal Rep. 526.

Part Two.

Having pointed out in the first part of our brief the decisions of this Court to the effect that generally allotments made in the Cherokee Nation, as well as in each of the other Five Civilized Tribes, where the allottee dies before making his selection, descend to the heirs free of restrictions, we now proceed with the inquiry whether the Act of April 26,

1906, particularly section 22 of that Act, requires any modification in these decisions. We take the position that the reasons which prompted Congress in the enacting of the allotment treaties to provide that lands selected after the death of the allottee should descend to the heirs without restrictions have remained the same. To say that Congress did not know the Indian character when the allotment treaties were made but has since learned the strength and weakness thereof would not be warranted. And to say that the Indian under the policies incorporated by Congress into the allotment treaties has become less competent, so that Congress in the Act of April 26, 1906, reverses in an important particular its attitude towards him, is an admission of failure by the Federal government in its attempt to advance the interests of the Indian through the allotting in severalty of the Indian lands. Rather do we notice Congress to be confirmed in its position that these Indian allottees should be allowed the same freedom in alienating their lands, which the white man has in alienating his lands, for, with the exception of full-bloods and in some instances those possessing one-half or more Indian blood, subsequent legislation by Congress touching the rights of these Indians to alienate their lands removed restrictions (See Act of April 21, 1904, (33 Stat. at L. 189, 204); Act of April 26, 1906, *supra;* Act of May 27, 1908, *supra*). The unstrained conclusion results that the same purpose was before Congress when it enacted

section 22 of the law of April 26, 1906, that was before it when it enacted the allotment treaties, and our task is then to give weight and meaning to the words of that section which we again set out:

> That the adult heirs of any deceased Indian of either of the Five Civilized Tribes *whose selection has been made, or to whom a deed or patent has been issued* for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent then such minors may join in a sale of such lands by guardian duly appointed by the proper United States court for the Indian Territory; and in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. *All conveyances made under this provision* by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe (Italics are ours).

This is not *res integra*, for beginning with *Tiger* v. *Western Investment Co.*, *supra*, this court has distinguished between allotments made prior to the death of the allottee and those selected for the heirs subsequent to the death of the allottee. The point in that case as stated at page 299 of the opinion was: "Could a full-blood Creek Indian, on and after the eighth day of August, 1907, convey the lands inher-

ited by him from his relatives, who were full-blood Creek Indians, *which lands had been allotted to them*, so as to give a good title to the purchaser—although the conveyance was made without the approval of the Secretary of the Interior!" The Court carefully distinguished between lands allotted to the deceased Indian prior to his death and lands allotted in his name after his death; and made no reference to the status of a sale of lands allotted after the death of the allottee, where such sale was made after April 26, 1906. The Court answered this question in the negative, so far as lands allotted prior to the death of the allottee were concerned. In *Mullen* v. *United States* the Court in construing the Choctaw-Chickasaw allotment treaty classified allotments as it had in the Tiger case construing the Creek allotment treaty, saying in the Mullen case at page 452: "The scheme defined two classes of cases, (1) allotments made to members of the tribes, and to freedmen, living at the time of allotment, and (2) allotments made in the case of those whose names appeared upon the tribal rolls but who had died after the ratification of the agreement and before the actual enrollment had been made;" and concluded that under section 22 of the Choctaw-Chickasaw allotment treaty conveyances by both full-bloods and mixed bloods were valid. The language used by the Court in reaching its conclusion is general and not limited to the time prior to April 26, 1906. In the statement of facts, however, it is said: "The lands, conveyed to the appellants, are

described as those which had been allotted to Choctaws of the full-blood, deceased, and the conveyances were made by their heirs (also Choctaws of the full-blood) prior to April 26, 1906." We then have a situation under which it is held in the Tiger case that a conveyance made after April 26, 1906, by full-blood heirs of lands which had been allotted to their ancestor prior to his death is invalid unless approved, and under which it is held in the Mullen case that a conveyance made before April 26, 1906, by full-blood heirs of lands which had been allotted to their ancestor subsequent to his death is valid though not approved, and there being nothing in the language of the opinion in either case to indicate that the result would have been different in the Mullen case, if the conveyance had been subsequent to April 26, 1906. This Court held in *Skelton* v. *Dill*, *supra*, that a conveyance of Creek lands made in September, 1905, by the heirs of an allottee who had not received his allotment prior to his death was valid without approval. The Court does not intimate what its decision would have been, if the conveyance had been made after April 26, 1906, though no language is used in the opinion which indicates that a different conclusion would have been reached. Perhaps the point involved in the instant case has been passed upon by this Court in *Atkins* v. *Arnold*, 235 U. S. 417. In that case an allotment was made on behalf of Otheola Adkins after her death. Her only heir was her mother, a Creek by blood, the degree of the mother's

Indian blood not being stated. The land allotted was conveyed on January 15, 1907, by the mother who contended before this Court that such deed was contrary to the provisions of section 16 of the Act of June 30, 1902, 32 Stat. at L. 500. Neither the outline of the argument of plaintiff in error nor the opinion of the Court as reported makes any reference to the Act of April 26, 1906. If the plaintiff in error in that case was a full-blood (there is nothing in that case disclosing she was not), and this Court should now hold that section 22 of the Act of April 26, 1906, put restrictions back upon allotments which were made subsequent to the death of the allottee, *Atkins* v. *Arnold* would be reversed. On the other hand, if the plaintiff in error in that case was less than a full-blood Creek, and this Court had in mind at the time that case was before it that said section 22 applied to allotments which were made after the death of the allottees as well as to those which were made to the allottee before death, it would have based its opinion upon that ground, that is, the conveyance by the plaintiff in error would have been held valid because section 22 of the Act of April 26, 1906, gave her the right to convey. However, we must not lose sight of the fact that, unless a distinction is made in the Act of April 26, 1906, between allotments made before death and those made after death, that section modified the law of restrictions contained in section 16 of the Act of June 30, 1902, as well as the law contained in section 28 of the Orig-

inal Creek Agreement, approved March 1, 1901, 31 Stat. at L. 861, so that after April 26, 1906, the distinction between allotments made before death and those made after death would be abolished; and whether an inherited allotment was restricted would depend upon the language contained in the last named Act. The five-year limitation contained in section 16 of the Supplemental Creek Allotment treaty would be abolished so far as the alienating by mixed bloods of inherited lands are concerned, no distinction being made between allotments made before and those made after the death of the allottee, and the provision in section 28 of the Original Creek Allotment Treaty in reference to alienating allotments made after the death of the allottee would be entirely superseded. If the plaintiff in error in the Atkins case was a fullblood, the facts of the case are the same as in the Tiger case, except that in the Atkins case the allotment was made subsequent to the death of the allottee; so, if Congress by section 22, Act of April 26, 1906, repealed section 28 of the Original Creek Agreement insofar as it declares the status of restrictions on allotments made after the death of the allottee, the two classes of allotments would merge, and the Atkins case being the later in time would reverse the Tiger case. But it is only by a strained construction of the language of the Act of April 26, 1906, and of the opinions of this Court that we are called upon to do violence to the conclusions reached in one of these cases. The conception which

this Court has had in all of its opinions relating to the allotting of lands in the Five Civilized Tribes as to the purposes which Congress had before it when legislating upon the subject is unwavering. The restrictions placed by Congress upon the alienation of Indian lands have been such only as the incompetence or improvidence of the allottee required. The allotment which each allottee received was sufficient for this purpose, and we find that its alienation was restricted under all the allotment treaties in the Five Civilized Tribes. Allotments made for the benefit of the heirs of deceased Indians became an abundance of wealth and did not afford such protection for the Indian as Congress intended his own allotment should. Indeed, the accumulating by inheritance of restricted land can become as serious a menace in the body politic as the accumulations of land made by purchase by shrewd and unscrupulous men.

The Circuit Court of Appeals for the Eighth Circuit has recently made a valuable addition to the law applicable to the instant case. In *Sunday* v. *Mallory*, 237 Federal Reporter, 526, 535, that court said:

> There is nothing in the language (of section 22, Act of April 26, 1906) which specifically imposes restrictions on allotments theretofore unrestricted, and especially when taken by the heirs of a deceased member on selection by an administrator, and we think it more in consonance with the language used, and more in ac-

cord with the construction placed upon the restriction clauses of the several agreements above discussed, to hold that section 22 of the Act of April 26, 1906, does not impose restrictions upon lands theretofore unrestricted in the hands of heirs of a member of the Cherokee Tribe, who died before receiving his allotment, and where selection was made by his administrator.

Congress in passing the various acts (in freference to allotting the lands in the Five Civilized Tribes and fixing the status thereof as to restrictions thereon) heretofore discussed, was legislating for large classes of cases, and not for isolated instances. Furthermore, Congress was keeping in mind, while imposing restrictions upon the alienation of these Indian lands: First, whether the restrictions were necessary in certain classes of cases; and, secondly, to what extent. The broad plan of legislation was to protect the allotments of lands made to individual living members, as such, whether while remaining in the hands of the original allottee, or thereafter, while in the hands of his heirs. The plan of legislation did not contemplate restricting alienations of all lands that a full-blood might in any wise acquire; for example, by purchase, or in any other manner than from the government. In other words, it was not merely the relationship of guardian and ward between the government and the Indian that was the foundation and reason for restrictions upon alienation of his land, but it was this relationship plus the plan of distributing allotments of lands in severalty to living members of the several tribes, and the restrictions were limited to the reasonable carrying out of the

plan. It was in view of such considerations that restrictions were imposed upon alienation of allotments to living members, first, while in the hands of the allottee, and, secondly, to a less extent while in the hands of heirs.

There would naturally be two classes of heirs of the duly enrolled members: The first class, those heirs whose ancestors became actual allottees; the second class, those whose ancestors were duly enrolled, but died before receiving allotment. The first class would be presumably large; the second, naturally, comparatively small. Furthermore, in the second class would be naturally many persons who were living at the time of the taking effect of the enrollment, and who would be themselves enrolled and entitled to allotments, and such allotments would carry the usual restrictions, so that the necessary protection would be afforded them in connection with their own allotments.

We proceed to make an analysis of section 22. The first classification it makes is of allotments to allottees who are living and of allotments to allottees who are dead. To the alienating of allotments held by living allottees it does not apply, for the law controlling the alienating of that class of allotments is found in section 19 of the same Act and in prior Acts of Congress. Then does it apply to the alienating of any allotment made to or in the name of a deceased allottee? If so, would not Congress have more accurately expressed its purpose by leaving out the relative clauses "whose selection has been made, or to whom a deed or patent has been issued

for his or her share of the land of the tribe to which he or she belongs or belonged?" Are not such clauses as descriptive and limitative of Indian as the adjective deceased? And the verbs "belongs or belonged" have a somewhat more important function than attaching the Indian to a particular tribe. They attach him to the tribe at the time of his death, whether that be before or after April 26, 1906; and, finally, they refer only to a portion of deceased Indians, namely, those whose selections had been made at the time of death. If Congress did not intend by this section to make any distinction between selections for allotments made prior to death and selections made after death, it would have been easier to have said: "That the adult heirs of any deceased Indian of the Five Civilized Tribes may sell and convey the lands inherited from such decedent." Putting the clause more conveniently before the eye, but without improving its language or changing its meaning, we rewrite it as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Trbies whose selection has been made prior to his or her death, or to whom a deed or patent has been issued prior to his or her death for his or her share of the land of the tribe to which he or she belongs or belonged at the time of death, may sell and convey the lands inherited, etc."

We therefore submit our conclusion in the second part of our argument that it was proper after

April 26, 1906, to classify allotments in the Cherokee Nation into those made (1) before the death of the allottee, and (2) after the death of the allottee, basing our conclusion particularly upon *Atkins* v. *Arnold*, *supra*. And further, if this distinction between allotments made before the death of the allottee and those made after the death of the allottee continued after the Act of April 26, 1906, then Congress did not and could not have by that Act repealed section 20, *supra*, of the Cherokee Allotment Treaty (32 Stat. 716); consequently the lands selected by the administratrix for the allotment of John S. Burgess, and allotted to his heirs after his death, passed to said heirs under section 20, *supra*, unaffected by the Act of April 26, 1906.

Part Three.

If we are right in our contention made in the argument which precedes, and this Court holds that the Act of April 26, 1906, did not disturb the status of allotments made in the Cherokee Nation under section 20 of the Cherokee Allotment Treaty, this part of our argument may be ignored. But if this Court should hold that said section 22 abolished all distinctions between allotments made before death and those made after death, we still say that we are within the law of said section, though admitting that our compliance with the letter of the law was accidental and not by reason of any far-sighted construction which we placed upon said section at the

time the contract of May 11, 1906, was entered into; but, be this as it may, plaintiff in error took contracts from all the heirs of John S. Burgess for an one-half interest in the allotment of the deceased, joining the defendant in error who was a minor in such contracts by his guardian duly appointed by the proper United States Court for the Indian Territory. The contract was made before the organization of a state or territory, and, consequently, was not entered into upon an order of the county court of the county in which the defendant in error resided; neither was such contract entered into upon petition filed by the guardian in such county court. Defendant in error not being a full-blood, said contract was not approved by the Secretary of the Interior.

It is quite clear that Congress provides in this section two distinct methods whereby a minor may dispose of inherited lands covered by the provisions of this section: First, while the United States Courts for the Indian Territory are in existence a duly appointed guardian of that Court may join with adult heirs and dispose of his ward's interest in an inherited allotment embraced in the terms of said section; second, after a state or territory has been organized the guardian of the minor inheriting allotted lands may upon petition filed obtain an order of the county court authorizing such guardian to alienate such inherited lands. The language making these classifications is precise.

The Supreme Court of Oklahima in *Wilson* v. *Morton*, 119 Pacific Reporter, 215, construed the procedure provided in this section insofar as it applied to a sale of inherited Cherokee lands subsequent to statehood by both adult and minor heirs, saying:

> The trial court took the view that said section 22 fixes within its own terms the procedure to be followed in making a sale thereunder, and that no other statute has any application thereto. In that view we concur * * *
>
> The Act does not specifically prescribe that the sale may be made for the purpose or under the procedure prescribed by the statute then in force in the Indian Territory, authorizing and providing for the sales of real estate of other minors than Indian; and, if said statutes or the statutes in force at the time of this sale ever had any application to the sales of minors' lands made under said section 22 of the Federal Act, they must be held to have done so by implication, and not by any express provision of the Act * * *.

In our case the Supreme Court of Oklahoma adheres to the views expressed in *Wilson* v. *Morton*, but obliterates any distinction between the two classes of procedure provided under said section 22 for the sale of inherited allotted lands by minors. Maintaining proper deference for the Supreme Court of that state, but desiring to support our conclusion with their reasoning, we quote further from *Wilson* v. *Morton*:

> The power of Congress to regulate how lands may be sold which have been allotted by the Federal Government to members of the Indian Tribes with restrictions upon their power to alienate them has been often sustained by the courts; and the policy of Congress, both as to the Five Civilized Tribes and as to other Indian Tribes, where sales have been permitted subject to the approval of some designated agent or authority of the Government, has been *to lodge in such officer a broad discretion to be exercised in determining whether such sales shall be approved.* The Act authorizing certain of the minors to join with adult heirs in the sale does not apply to all minors, and is not general in its nature. It attempts to provide for the conveyance by certain minors in specific cases of their undivided interests in inherited lands, and we must look to the terms of the statute itself for the procedure by which such sales may be made, and not to the general statutes of the state authorizing and regulating the sale of the real estate of minors.

We are in accord with the Supreme Court of Oklahoma so far as the above reasoning is concerned; and we agree with that court that the procedure provided in section 22, *supra*, superceded the general statutes in the Indian Territory upon the subject, if it should be held that said section 22 applies to allotments selected after the death of the allottee; but we believe that the conditions in Indian Territory prior to statehood, the reasoning of that court in the Wilson case and the wording of section 22, *supra*, fail entirely to justify that court in holding the procedure

to be the same before statehood that it was after statehood. First, the conditions of the courts in the Indian Territory prior to statehood were such that it was quite difficult to obtain a hearing by the court on probate matters. All dockets were crowded and there was no hope that the existing courts would dispose of the work as fast as it was accumulating. Probate matters on account of leasing for oil and gas were unprecedented in volume. Many large towns such as Tulsa had no court. And dispensing with the usual lenghty probate procedure did not jeopardise the rights of the minor, for his guardian was appointed by a United States court, who was an agent of the Federal government strictly accountable as such; and said section requiring the minor to be joined by the other heirs, adults and his nearest of kin, they would know whether the best interests of the minor were being subserved, and would protect him by themselves refusing to join in the sale, if it was not advantageous to the minor; second, the reasoning of the Supreme Court of Oklahoma in the Wilson case, *supra*, supports our construction in this particular of section 22, notwithstanding that court reaches a different conclusion; third, the provision that "such minors may join in a sale of such lands *by a guardian* duly appointed by the proper United States Court for the Indian Territory" constitutes a method of sale by minors complete in itself without reference to what follows in said section 22. Again, if the provisions in the succeeding clauses of said

section 22 in reference to the guardian filing a petition and obtaining an order of the county court authorizing the guardian to make the sale are to be joined with the sentence just quoted, why should not the phrases "in which said minor or minors may reside or in which said real estate is situated" be joined? Conditions before statehood and after statehood were entirely dissimilar, and Congress was cognisant of the facts when it enacted said section 22; and any attempt to amalgamate the two methods of sale produces chaos. Before statehood the minor sells "by a guardian duly appointed," after statehood "by a proper court of the county in which said minor or minors may reside or in which said real estate is situated." Would a county mean before statehood a judicial district or a recording district? Where the sale is by a proper county court would the adult heirs be compelled to join in the probate proceedings? Is it not important that the adult heirs be relieved from the expense and delays which were so burdensome in probate proceedings before statehood? It does not seem necessary that these annoying questions require an answer. Congress must have meant what it said, namely, that there should be one method before statehood and another method after statehood whereby a minor might dispose of his interest in the class of lands which said sectio 22 embraced.

Concluding this part of our brief we say that we have complied with the procedure which said sec-

tion 22 provides for minors to follow in selling or binding the class of lands embraced in that section; but that in our judgment said section provides neither a substantive law nor a law of procedure for lands selected in the Cherokee Nation for allotment after the death of the allottee, and that the contract of May 11, 1906, should be construed according to the general law in force in the Indian Territory concerning the methods by which a minor's land might be bound by his guardian on that date, which law allowed a guardian in socage to make necessary contracts with an attorney, binding the estate, both real and personal, of his ward to secure the attorney's fee.

It is probably true that there is no other contract now in force made in the Indian Territory affecting allotted lands inherited by Indian minors, and that the decision in this case will be upon an isolated point; but this is a contract made b yan attorney with his client, a minor client, and, while one may have "a peace above all earthly dignities, a still and quiet conscience," there is still an opportunity left for us to obtain comfort by knowing that our conscience is based upon right dealing as measured by the standards of other men. The plaintiff in error is not seeking to win a case here upon a technicality; but seeks to have the cause tried below on its merits.

If we are right in our contentions:

First, that the lands embraced in the contract made by the plaintiff in error on May 11, 1906, were selected for allotment after the death of the allottee under section 20, Act of July 1, 1906, (32 Stat. 716), ratified August 8, 1902, and were free of federal restrictions on May 11, 1906;

Second, that the Act of April 26, 1906, (34 Stat. 137), particularly section 22 of that Act, did not abolish the distinctions made under the Act of July 1, 1902, between selections for allotments made before and selections for allotments made after the death of the allottee, so that lands allotted under said section 20 of the Act of July 1, 1902, continued to be free of restrictions against alienation after April 26, 1906; and

Third, that the plaintiff in error complied with the strict letter of the law as to the method to be followed in taking from the defendant in error the contract of May 11, 1906, providing for an attorney's fee to be taken out of inherited allotted lands in the Cherokee Nation, if it should be held that section 22 of the Act of April 26, 1906, provided the only method by which such inherited lands could be aliened after April 26, 1906,

the Supreme Court of Oklahoma has committed error, which warrants us in asking a reversal of this cause.

Respectfully submitted,

HASKELL B. TALLEY,

Pro se.

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No. 157.
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In the
Supreme Court of the United States
October Term, 1917.

H. B. TALLEY, ... Plaintiff in Error,

vs.

DANIEL S. BURGESS, a Minor; J. L. HARNAGE, Guardian ad Litem, . . . Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BENJAMIN F. RICE
AND
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In the

Supreme Court of the United States

October Term, 1917.

No. 157.
(25260)

H. B. TALLEY, - - - - - Plaintiff in Error,

vs.

DANIEL S. BURGESS, a Minor; J. L. HARNAGE, Guardian ad Litem, - - - Defendants in Error.

In Error to the Supreme Court of the State of Oklahoma.

STATEMENT OF FACT.

The facts upon which this cause must be decided are set forth in the amended petition of plaintiff in error, which alleges as follows:

> "One. That the plaintiff and the defendants herein are residents of the County of Tulsa, Oklahoma, and that the defendant, Daniel S. Burgess, is a minor.

Two. That on May 11, 1906, the plaintiff as agent for and as one of the partners of the co-partnership of Talley & Harnage made a contract with Nora B. Burgess, the duly appointed, qualified and acting guardian of Daniel S. Burgess, whereunder and whereby the said defendant, Daniel S. Burgess, was to give to the plaintiff herein for the firm of Talley & Harnage a one-half interest in and to the interest of the said Daniel S. Burgess in the East one-half of the Northeast quarter of the Southeast quarter and the Northeast quarter of the Southeast quarter of the Southeast quarter of Section 35, Township 20 North, Range 12 East, in consideration of the legal services theretofore and thereafter to be performed by the plaintiff herein and by the firm of Talley & Harnage, lawyers, and that the plaintiff herein and the firm of Talley & Harnage performed all of the services agreed to be performed under said contract of May 11, 1906, in strict conformity to said contract and through and by reason of and as a result of said services the title to the above described land was acquired by the defendant, Daniel S. Burgess, and was confirmed in said Burgess, and that said Burgess, at the time of the filing of this suit was in possession of said premises and the holder of the legal title thereto and had ratified, adopted and confirmed the said contract of May 11, 1906, and accepted all of the benefits under said contract of the services of the plaintiff herein and of the firm of Talley & Harnage rendered as aforesaid.

Two and one-half. That on the same date and at the same place this plaintiff, as agent for and as one of the partners of the copart-

nership of Talley & Harnage, made and entered into contracts identical with the contract entered into as aforesaid with Daniel S. Burgess, with all the other heirs, both minors and adults, of said John S. Burgess, and that said contracts were then and there signed and delivered by each and every of said heirs of the said John S. Burgess.

Three. That your petitioner and the firm of Talley & Harnage have fully performed all of the conditions of said contract, a copy of which is attached hereto, marked Exhibit "A" and asked to be made a part of this petition, but that the said Daniel S. Burgess has refused and continues to refuse to perform the obligations binding upon him and under said contract and has refused to convey to the plaintiff for the firm of Talley & Harnage the one-half interest of the defendant, Daniel S. Burgess, in and to the above described property and has wholly failed to compensate the plaintiff and the firm of Talley & Harnage for any of the legal services performed under said contract and as set forth in said contract

Four. That the firm of Talley & Harnage was dissolved by mutual consent on June 30, 1907, and that the plaintiff has requested the defendant Harnage to join with the plaintiff in carrying out the terms of said contract of May 11, 1906, and has requested the said Harnage to join with the plaintiff in obtaining the fees of said firm and of your petitioner for the services rendered to the defendant, Daniel S. Burgess, but that the said Harnage has refused and continues to refuse to assist the plaintiff in carrying out the terms of said

contract and refused and continues to refuse to join with the plaintiff in this action.

Wherefore, the plaintiff sues the defendants and asks this Honorable Court that the plaintiff be given and decreed a one-half interest in the above described property as trustee of the firm of Talley & Harnage and that said land be partitioned, and for his costs in this suit, and such other relief as to the Court may seem meet and proper.

H. B. Talley."

It is evident from the statements of the petition that the plaintiff bases his right to recover from a minor one-half of said minor's real estate by virtue of a contract entered into by the guardian of the minor without the approval of any court.

The allegations in the amended petition that the defendant Daniel S. Burgess ratified, adopted and confirmed the contract of May 11th, 1906, and accepted all of the benefits thereof, may be disregarded, because it appears in said amended petition itself that at the time the amended petition was filed and thereafter said Daniel S. Burgess was a minor and was represented in this action by a guardian ad litem.

There is, therefore, no question of ratification or adoption in the case.

The question for consideration is whether said contract of May 11th, 1906, affecting a minor's

interest in lands of the Cherokee Nation in the Indian Territory, said contract not having been made with the authority of any court, is sufficient to authorize the award of specific performance.

The contract is in words and figures as follows:

"This contract, made and entered into on this the 11th day of May, 1906, by and between Daniel S. Burgess, minor, by Nora B. Burgess, guardian, party of the first part, and Talley & Harnage, lawyers, party of the second part, both parties being residents of Tulsa, I. T., Witnesseth:

Whereas, the party of the first part is one of the heirs and the only minor heir of John S. Burgess, deceased, a Cherokee by blood, and Nora B. Burgess has been duly appointed, qualified and is now acting as guardian of the person and estate of said minor, and the other heirs of said deceased are Nora B. Burgess, widow, who was elected to take a child's part in lieu of dower, Carrie V. Hanson, daughter, and Alma V. Gipson, daughter; and

Whereas, the said John S. Burgess died seized and possessed of certain improvements on land situate North and adjoining the townsite of Tulsa, I. T., said land containing eighty-nine and thirty-five one hundredths (89.35) acres, subject to allotment by the said deceased by reason of and because of the fact that the improvements on said property belonged to said deceased and said land being more particularly described as follows: NE4 of the SE4 and N2 of the SE4 of the SE4 and

lot 7 in section 35, township 20 North, range 12 East of the Indian Principal Meridian, and said land being filed on by said Nora B. Burgess, an adopted white citizen of the Cherokee Nation; and

Whereas, the rights of said Nora B. Burgess to allotment in the Cherokee Nation are now being litigated and a decision thereon pending in the Supreme Court of the United States, and said decision will in all probability be adverse to said Nora B. Burgess; and

Whereas, said John S. Burgess had prior to his death been induced by fraud to make deed to certain property situate in North Tulsa, Cherokee Nation, the description of said property being as follows: Lots 1, 2, 3, and 6 in block 5; lots 1, 2, 3 and 6 in block 4, and lot 1 in block 11, according to the official plat of North Tulsa, Indian Territory; and

Whereas, said party of the second part has successfully terminated an appeal to the Honorable Secretary of the Interior, the decision of the Honorable Secretary, dated May 2, 1906, authorizing and directing the said Nora B. Burgess, as representative of the estate of John S. Burgess, deceased, to cancel the filing heretofore made by her as an individual upon said NE4 of the SE4 and N2 of the SE4 of the SE4 and lot 7, in section 35, township 20 north, range 1 east, and file thereon her husband's rights, all contracts for the transfer and leasing of said land being declared null and void; and

Whereas, said party of the first part is desirous of setting aside the fraudulent contract and deed made by said John S. Burgess, prior

to his death, to W. T. Brady and R. C. Brady, for city property above described, and has engaged the party of the second part to take the necessary legal steps for setting aside said contract and transfer and the party of the second part has agreed to give their services for these purposes; and

Whereas, the party of the second part has been engaged by the party of the first part to partition all of the real estate which said John S. Burgess owned or was entitled to at law or in equity, and to furnish said party of the first part all and such other legal services in the premises as may be necessary in the final winding up of the estate of said John S. Burgess, deceased, and all and such other services as may be necessary in safeguarding the interests and the estate of said minor during his minority; and

Whereas, said party of the first part has hereby engaged the party of the second part to act as his attorney in fact in the platting and selling and transferring of said land heretofore embraced in the allotment of said Nora B. Burgess and said city property embraced in the fraudulent deed above set forth, said power of attorney being coupled with an interest and said power being hereby expressly accepted by the party of the second part, and the duties imposed therein hereby expressly assumed by said party of the second part;

Now, therefore, the party of the first part covenants and agrees, for himself, his heirs, executors, administrators and assigns, to give to the said party of the second part, in consideration of the above agreement, and of the duties above assumed by the party of the sec-

ond part, a one-half interest in all of the property passed by and through said fraudulent transfer to W. T. Brady and R. C. Brady, which may be recovered from said grantees, their heirs, executors, administrators or assigns, and a one-half interest in the land formerly embraced in the allotment of Nora B. Burgess, and now embraced in the allotment of John S. Burgess, deceased.

The party of the first part hereby expressly covenants and agrees, for himself, his heirs, executors, administrators, and assigns, to faithfully perform his part of this contract, and that all powers herein granted to said party of the second part are binding and irrevocable.

The party of the second part hereby binds itself, its successors and assigns, to perform to the best of its ability all the duties herein imposed and assumed

In witness whereof, the parties hereto have signed their names and attached their seal on this the 11th day of May, 1906.
Witnesses:

Daisy Clark
E. Milton Latimer

Nora B. Burgess (Seal)
Talley & Harnage (Seal)
By H. B. Talley."

We believe that it is desirable to present an analysis of the foregoing contract.

It appears from the terms thereof that said contract relates to two distinct and different subjects:

First:

> The premises described as the Northeast quarter of the Southeast quarter and the North half of the Southeast quarter of the Southeast quarter, and Lot Seven (7) in Section Thirty-five (35), Township Twenty (20) North, Range Twelve (12) East of the Indian Principal Meridian.

The foregoing premises are the subject matter of this action and constitute the entire premises described in plaintiff's amended petition. Said subject matter will hereafter for convenience be referred to in this brief as "*the allotment of John S. Burgess, deceased.*"

Second:

> Certain property situated in North Tulsa, Cherokee Nation, which it is alleged John S. Burgess had been induced by fraud to deed to W. T. Brady and R. C. Brady, said property being described as Lots 1, 2, 3 and 6 in Block 6, Lots 1, 2, 3 and 6 in Block 4, and Lot 1 in Block 11, according to the official plat of North Tulsa, Indian Territory.

The foregoing property is not involved in this action and is not referred to in plaintiff's amended

petition. Said property will, for the sake of convenience, be hereafter referred to in this brief as the "*Brady property.*"

Referring specifically to the "Brady property," the contract provides that Talley & Harnage shall bring an action for the recovery of same and shall receive a one-half interest in all of the property passed by and through said alleged fraudulent transfer to W. T. Brady and R. C. Brady which may be recovered from said grantees.

Referring to the "allotment of John S. Burgess, deceased," the contract provides that John S. Burgess was a Cherokee citizen by blood, who died seized of the improvements located on said "allotment of John S. Burgess, deceased," and that Nora B. Burgess as representative of the estate of John S. Burgess, deceased, had caused said lands to be selected as the "allotment of said John S. Burgess, deceased."

Under the provisions of the Cherokee Treaty and under the decisions of this Court (*Sizemore* v. *Brady*, 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308) the equitable title to said premises thereupon became vested in the heirs of John S. Burgess, deceased, one of whom was Daniel S. Burgess, a minor.

The contract further provides relative to said "allotment of John S. Burgess, deceased," that whereas Talley & Harnage, attorneys, had been en-

gaged by Nora B. Burgess, guardian of Daniel S. Burgess, a minor, to partition all of the real estate which John S. Burgess owned or was entitled to at law or in equity, and to furnish such other legal services as might be necessary in the final winding up of the estate of John S. Burgess, deceased, and such other legal services as might be necessary in safeguarding the interests of the estate of the minor during his minority; and, whereas said Talley & Harnage were further engaged to act as the attorney in fact of Nora B. Burgess, guardian, in the platting and selling and transferring of the "allotment of John S. Burgess, deceased," and the "Brady property," said Nora B. Burgess, guardian, covenanted on behalf of Daniel S. Burgess, a minor, to give to Talley & Harnage in consideration of the above agreement a one-half interest in all of the "Brady property" which might be recovered from grantees and also a one-half interest in the "allotment of John S. Burgess, deceased."

It will be noted from the exact language of the contract that Daniel S. Burgess, a minor, by Nora B. Burgess, guardian, is bound on his side to give to Talley & Harnage a one-half interest in the land embraced in the "allotment of John S. Burgess, deceased." In consideration therefor Talley & Harnage were to perform the following acts:

First: To partition all of John S. Burgess' real estate;

Second: To furnish all legal services necessary in the final winding up of the estate of John S. Burgess, deceased;

Third: To furnish all legal services necessary in safeguarding the interests and estate of Daniel S. Burgess, a minor, during his minority;

Fourth: To act as attorney in fact of Daniel S. Burgess, a minor, in the platting, selling and transferring of the "allotment of John S. Burgess, deceased."

The contract further provides that Talley & Harnage shall bring an action to recover the "Brady property" and for such service and for partitioning, platting, selling and transferring same, Talley & Harnage shall have a one-half interest in said "Brady property."

The amended petition alleges that Harnage refused to join in the suit and is therefore made a party defendant.

The contract and the record further plainly discloses that *Daniel S. Burgess was a minor at the time of the filing of the suit, at the time of the trial in the District Court of Tulsa County and is yet, so far as is disclosed by the record, a minor.*

The amended petition further discloses that said minor was under guardianship on May 11, 1906; that Nora B. Burgess was his guardian and so far

as is disclosed by the record said minor is still under guardianship and said Nora B. Burgess is still his legal guardian.

A guardian *ad litem under the Oklahoma practice was appointed* to defend said suit. Under the Statutes of Oklahoma, it is not uncommon for the Court to appoint some person other than the general guardian of the minor to defend litigation.

Therefore, said appointment in no way operates against the presumption that Nora B. Burgess continued to be the general guardian of Daniel S. Burgess, a minor.

It should be noted that *Nora B. Burgess is not made a party to the suit and the amended petition sets forth no explanation of plaintiff's failure to sue the general guardian of the minor.*

The record then discloses that Daniel S. Burgess was at the time of the bringing of suit and at the time of the trial of said cause a person under guardianship, incapable under the laws of the State of Oklahoma and under all legal principles of executing a conveyance to real estate, and incapable as well of ratifying, adopting or confirming any contract relative thereto.

The plaintiff, however, complains that said minor has refused to make a conveyance of one-half of his interest in the "allotment of John S. Burgess, deceased," and has wholly failed to compen-

sate Talley & Harnage for any of the legal services performed under the contract attached to the petition. The plaintiff therefore asks that the Court by its decree transfer to the plaintiff a one-half interest of the estate which Daniel S. Burgess, a minor, inherited in his father's allotment in the Cherokee Nation.

The petition further alleges that Talley & Harnage fully performed all the conditions of the foregoing contract.

One of these conditions was the furnishing of all services that might be necessary in safeguarding the interests and estate of the minor during his minority.

It cannot be contended that said services were rendered, since prior to the expiration of the minority of Daniel S. Burgess, the plaintiff has brought this legal action against him to recover on a contract which specifically requires plaintiff to defend the minor against claims of this character.

The contract, therefore, insofar as it relates to the "allotment of John S. Burgess, deceased," has two definite aspects:

First:

An agreement by a minor's guardian to convey real estate of the minor as an advance payment of an attorney's fee not yet earned, but to be earned

by the rendition of certain legal services, including

(a) A suit to partition real estate;

(b) Legal services to the estate of John S. Burgess, deceased; and,

(c) Legal services to the minor and his estate during the entire term of his minority.

Second :

A power of attorney to sell, plat and transfer real estate, coupled with an interest.

It appears, therefore, that the guardian of a minor has endeavored to execute a binding contract without the approval of any court for the conveyance of a part of the minor's real estate.

The foregoing statement sets forth the matters disclosed affirmatively by the contract and the amended petition

Inasmuch, however, as the presumptions are against the pleader and inasmuch as the contract was entered into between attorney and client, we believe it is proper to call attention to material facts which the amended petition fails to negative.

There is no allegation in the amended petition,

First: That a demand has ever been made on Nora B. Burgess for the payment of any proper charges due the plaintiff for services rendered to the estate of Daniel S. Burgess, a minor.

Second: That Nora B. Burgess has not paid plaintiff in full for all services rendered by him as an attorney or otherwise to the estate of Daniel S. Burgess, a minor.

Third: Said amended petition further fails to explain how Daniel S. Burgess, a minor under guardianship, is in possession of the "allotment of John S. Burgess, deceased," or how said fact can exist if Talley & Harnage partitioned, platted, sold and transferred said land as they were required to do by the terms of the contract, which it is alleged has been fully carried out.

Fourth: It does not appear from said petition why this suit is brought prior to the termination of the minority of Daniel S. Burgess, when one of the considerations upon which the contract sued upon was made was the furnishing of legal services to said minor's estate throughout said minority.

Therefore, under the facts alleged in the amended petition and set forth in the contract attached thereto and marked "Exhibit A," we think that there are certain insuperable obstacles to the awarding of any relief under said contract by a court of equity. Said matters will be detailed in the argument.

OUTLINE OF ARGUMENT.

The appellee will endeavor to demonstrate the following propositions:

I.

That a Recovery by Plaintiff is Conclusively Barred by the Facts Set Forth in His Own Statement.

We will discuss the foregoing proposition under the following subdivisions:

First: The amended petition and the contract therein set forth fail to state a cause of action against Daniel S. Burgess, a minor.

Second: No relief can be awarded for the further reason that there is a defect of parties defendant.

Third: Specific performance will not be decreed where it appears that plaintiff has not performed or offered to perform on his part the acts which formed the consideration of the alleged undertaking on the part of the defendant.

Fourth: Specific performance will not be decreed against a minor during minority.

Fifth: A conveyance or a contract to convey real estate of a minor, executed on May 11, 1906,

without the approval of the United States Court of the Indian Territory sitting in probate, is void and unenforcible in a court of equity.

II.

That the Decision of the Supreme Court of Oklahoma on the Question Raised Relative to Section 22 of the Act of April 26, 1906, 34 Stat. L. 137, Referred to in the Decision of That Court, is Right.

III.

That the Court Has No Jurisdiction of This Cause Under the Terms of Section 237 of the Judicial Code, R. S., Sec. 709, Act March 3, 1911, c. 231, Sec. 237, 36 Stat. 1156, as Amended by Act of December 23, 1914, Chapter 2, 38 Stat. L. 790.

ARGUMENT.

Proposition I.

That a Recovery by Plaintiff is Conclusively Barred by the Facts Set Forth in His Own Statement.

First: The amended petition and the contract therein set forth fail to state a cause of action against Daniel S. Burgess, a minor.

It appears from the record that this suit is maintained by the plaintiff against Daniel S. Burgess, a minor, for the purpose of compelling specific performance of a contract to convey real estate. Burgess was at the time of the trial and still is, so far as the record discloses, a minor. It is alleged that Burgess while a minor adopted, ratified and confirmed said contract providing for the conveyance of his real estate and while a minor has refused and failed to make said conveyance.

We assert that said minor had no authority under the laws in force in the Indian Territory on May 11, 1906, or under the laws in force in the State of Oklahoma at the time of the filing of this action or at any time prior or subsequent thereto to adopt, ratify and confirm during his minority a contract for the conveyance of his real estate.

We further assert that said minor had no au-

thority during his minority to make a conveyance of his real estate and that his refusal to make such conveyance does not entitle the plaintiff to sue him to compel the same. Any conveyance made by said minor during his minority would have been void and of no force and effect.

We assume that the foregoing propositions are self-evident and do not require the citation of authorities, but we call attention briefly to some of the cases:

Vaughn v. *Parr*, 20 Ark. 600;

Gault Lumber Co. v. *Pyles*, 19 Okla. 445, 92 Pac. 175;

Tucker v. *Moreland*, 35 U. S. 10 Pet. 58, 70, 71, 73-74, 77, 9 L. Ed. 345;

Dexter v. *Hall*, 15 Wall. 9, 21 L. Ed. 73;

Lamkin & Foster v. *Ledoux*, 101 Me. 581, 64 Atl. 1048;

Healy v. *Rowan*, 5 Grattan 414, 52 Am. Dec. 94 (Sup. Court of Appeals of Virginia);

Welch v. *Bunce*, 83 Ind. 382;

McCormic v. *Leggett*, 53 N. C. (8 Jones Law) 425;

Hobbs v. *Nashville, C. & St. L. Ry. Co.*, 122 Ala. 602, 26 So. 139;

Philips v. *Green*, 3 A. K. Marshall 7, 13 Am. Dec. 124 (Court of Appeals of Kentucky);

Wheaton v. *East*, 5 Yerger 41, 26 Am. Dec. 251 (Supreme Court of Tennessee);

McCarthy v. *Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418.

Second: No relief can be awarded for the further reason that there is a defect of *parties defendant*.

The contract for furnishing legal services to the estate of the minor was made by Nora B. Burgess, guardian of said minor. The plaintiff could not thereunder recover in any event any part of the minor's real estate as an attorney's fee under the facts alleged in the amended petition. The petition does not allege an employment for the recovery of the "allotment of John S. Burgess, deceased," but shows clearly that said allotment was equitably vested in the heirs of said Burgess (one of whom was the defendant) on May 11, 1906, at the time of the execution of said contract.

Therefore, plaintiff's argument relative to an employment contingent on success, to be paid for out of the proceeds of the recovery, has no application to the present controversy.

Such an argument might have an application to the "Brady lands" mentioned in the contract, which are, however, not the subject matter of this suit or involved herein.

The weight of authority is that the proper pro-

cedure in the event plaintiff has furnished services to the minor's estate is to hold the guardian personally liable for same. If said services were necessary and the amount of compensation therefor was just, the guardian is permitted to pay the same and charge against the minor's estate in her accounts rendered to the probate court. Such charge, if proper, is allowed by the court to the guardian and the matter is thus terminated.

"Contractual Powers and Liabilities Generally.

Generally speaking, a guardian is without power to bind the ward or his estate by any contract. Even if the contract be one which it was proper or necessary for him to make in the execution of the trust, the liability thereunder rests upon the guardian personally, and not upon the estate of the ward, and though he signs a note as guardian, and it is properly given for a debt incurred for the benefit of the ward, the guardian is personally liable. While this rule may seem unreasonable at first thought, it is supported by sound reason. The guardian knows or should know the condition of his ward's estate and what expenditures can properly be made from it. If the contract is a prudent and proper one, the guardian is perfectly protected by his right to charge his expenditures upon the assets. The person with whom he deals has not this knowledge or means of protection. Clearly, therefore, the other party should have the right to look to the guardian with whom he contracted; and the special care with which the law protects

the interests of an infant prohibits his estate to be charged with liability, except on the guardian's accounting before the probate court, which holds the guardian's bond to protect the infant from loss, and which acts equitably and with full knowledge of the situation of the estate. A few authorities, however, permit the ward or his estate to be directly held for debts properly incurred by the guardian. If the contract is not a lawful and reasonable one, a *fortiori* liability should fall on the guardian alone, and the infant's estate be free from liability. The guardian, therefore, and not the ward's estate, is liable on the covenants in deeds and leases."

12 Ruling Case Law, pp. 1128-1129.

So far as is disclosed by the petition, this procedure may have been followed and the plaintiff may have been compensated in full for any legal services he rendered to the estate of Daniel S. Burgess, a minor. Since the allegations of a pleading are taken against the pleader and since in a lawsuit between attorney and client the presumptions are ordinarily in favor of the client, it is a fair presumption from the pleader's failure to negative such material allegation that such payment has been made either to himself or Harnage.

At all events, Nora B. Burgess, who entered into the contract and who is still so far as the record discloses the legal guardian of Daniel S. Burgess, a minor, is a necessary party defendant in

this action, and the failure to make her a party is a defect fatal to plaintiff's cause.

Moore v. *Bannerman*, 45 S. W. 825 (Texas Civil Appeals);

Shepherd v. *Hanson*, 9. N. Dak. 249, 83 N. W. 20;

12 Ruling Case Law, 1157;

Andrus v. *Blazzard*, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354;

In re Kitchen, 89 N. E. 375 (Indiana Appeals);

Baker v. *Groves*, 1 Ind. App. 522, 27 N. E. 640;

Fish v. *McCarthy*, 96 Cal. 484, 31 Pac. 529;

Hunt v. *Maldonado*, 89 Cal. 636, 27 Pac. 56;

Kersey v. *O'Day*, 173 Mo. 560, 73 S. W. 481;

Weber v. *Werner*, 122 N. Y. Sup. 943;

Lothrop v. *Duffield*, 134 Mich. 485, 96 N. W. 577;

Glasgow v. *McKinnon*, 79 Texas 116, 14 S. W. 1050.

Third: Specific performance will not be decreed where it appears that plaintiff has not performed or offered to perform on his part the acts which formed the consideration of the alleged undertaking on the part of the defendant.

This Court has often reiterated the equitable principle that specific performance will not be awarded where it does not appear that the party seeking the same has fully performed said contract on his part, for the reason that specific performance will not be decreed where it appears that plaintiff has not performed or offered to perform on his part the acts which formed the consideration of the alleged undertaking on the part of the defendant.

One of the conditions of the contract which plaintiff sues on was the furnishing by plaintiff of legal services to the minor throughout the entire term of minority. In the event a suit of this character has been brought against the minor's estate, it was the duty of plaintiff under his covenant to safeguard the interest of the minor by his services to defend the same. The bringing of such a suit prior to the termination of minority is itself a repudiation of the contract and conclusively demonstrates that plaintiff has not carried out the terms thereof.

It further appears clearly from the contract that plaintiff and his associate did not plat, sell or transfer said allotment of John S. Burgess, deceased, as required by the contract. We admit that they could not have sold or transferred any part of said minor's real estate under the terms of their contract; however, if their contract is to be con-

sidered at all, said sale and transfer was one of the solemn duties which they specifically accepted under the terms thereof as a consideration for the granting of said purported power of attorney, coupled with an interest.

Colson v. *Thompson*, 2 Wheat. 336, 4 L. Ed. 253;

Denniston v. *Coquillard*, 5 McLean 253, 7 Fed. Cas. No. 3801.

Fourth: Specific performance will not be decreed against a minor during minority.

Tillery v. *Land*, 136 N. C. 537, 48 S. E. 824;

Gault Lumber Co. v. *Pyles*, 19 Okla. 445, 92 Pac. 175.

Fifth: A conveyance or a contract to convey real estate of a minor, executed on May 11, 1906, without the approval of the United States Court of the Indian Territory sitting in probate, is void and unenforcible in a court of equity.

Bettes v. *Brower*, 184 Fed. 342 (District Court for Eastern District of Oklahoma);

LeRoy v. *Jacobosky*, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977;

Funk v. *Rentchler*, 134 Ind. 68, 33 N. E. 364;

Wolf v. *Holton,* 104 Mich. 107, 62 N. W. 174;

DeArmit v. *Milnor,* 20 Pa. Super. Ct. 369;

Morse v. *Hinckley,* 124 Cal. 154, 56 Pac. 896;

Los Angeles County v. *Winans,* 13 Cal. App. 234, 109 Pac. 640;

Houlihan v. *Fogarty,* 162 Mich. 492, 127 N. W. 793;

Burke & Williams v. *Mackenzie,* 124 Ga. 248, 52 S. E. 653;

Dellinger v. *Foltz,* 93 Va. 729, 25 S. E. 998;

Andrus v. *Blazzard,* 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354;

Curry v. *Keil,* 46 N. Y. Sup. 495 (19 App. Div. 375);

Storey v. *Lonabaugh,* 247 Pa. 331, 93 Atl. 481;

Robinson v. *Long Gas Co.,* 221 Fed. 398 (Circuit Court of Appeals, Eighth Circuit, decided February 12, 1915.)

Proposition II.

That the Decision of the Supreme Court of Oklahoma on the Question Raised Relative to Section 22 of the Act of April 26, 1906, 34 Stat. L. 137, Referred to in the Decision of That Court, is Right.

The plaintiff's remedy, if he has performed services beneficial to the minor and has not received compensation for same, all of which does not appear from this petition, is to bring suit upon a *quantum meruit* for the value of the services, not upon a void contract.

We do not make an extended argument on the question of the applicability of the federal statute above cited to this particular allotment. Congress undoubtedly had power to impose such restriction even though the allotment was unrestricted at the time of the selection thereof and the vesting of title. There is no constitutional objection to such legislation.

Brader v. *James*, 154 Pac. 560 (Okla.) not yet officially reported;

Sampson v. *Staples*, 155 Pac. 213 (Okla.) not yet officially reported;

Levindale Lead & Zinc Mining Co. v. *Coleman*, 241 U. S. 432, 36 Sup. Ct. 644, 60 L. Ed. 1080;

United States v. *Nice*, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192;

Western Investment Company v. *Tiger*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.

However, the public policy of the United States and the State of Oklahoma forbids alienation by an Indian minor of his estate prior to the attainment of majority. This rule has often been recognized by the Supreme Court of Oklahoma and is well expressed in the decision in the case of *Grissom* v. *Beidleman*, 35 Okla. 343, 129 Pac. 853, at page 858. Chief Justice Williams, speaking for the Court, says:

> "We believe that the rule in New Hampshire, followed in Massachusetts and other states, should prevail here. That is where the services pertain to the defense of the liberty or person of the minor, or the prosecution of actions for an injury thereto, that the same should be classed as a "necessary," and an action lie against the minor for a reasonable recovery for attorney's fees; but where the legal services are rendered in behalf of the minor in relation to his property, without the intervention of a legal guardian, no recovery for such services should be had in an action at law. As to whether a court of equity or probate court may allow for legal services rendered at the instance of the minor in the administration of the estate or fund or property in such chancery or probate court, without the party having first obtained the ap-

proval of the court to render such service, that question is not involved in this case.

It is a well-known fact that in the Five Civilized Tribes, Osage Nation, Quapah country, and other Indian reservations in this state, minors are possessed of valuable landed estates, and are continually coming into such inheritances. The estates of these Indians, though wards of the federal government, are administered by the probate courts of this state; it being done by the surrender of that jurisdiction to the state tribunals by the federal authority. The federal legislation, heretofore referred to, shows a policy on the part of the federal government of precaution to carefully guard the interests of these Indian minors. The best interests of this state demand the speediest settlement of all Indian estates to the end that as much Indian land as is reasonably possible may become developed and help bear the burdens of the state, county, township, and school district governments. This can be brought about in a most salutary way by the local courts. When it comes to a question as to which line of authorities we will follow, that which permits the next friend, who is often an irresponsible person, to engage counsel for a minor to prosecute a suit at law in his behalf relative to his land, often occasioning an action at law against such minor, thereby affecting his estate, or that which requires first the approval of the probate court, we feel that we should incline to the old rule, as announced by the Supreme Court of New Hampshire, when it was composed of Chief Justice Parker and Justices Upham, Wilcox, Gilchrist and Woods, and

afterwards reaffirmed by the same court, when Chief Justice Sargent and Justice Doe were members of it.

Judgment was rendered by default against the defendants. The objection that the petition does not state a cause of action may be raised on review for the first time in this court. *Leforce et al.* v. *Haymes*, 25 Okla. 190, 105 Pac. 644; *International Harvester Co.* v. *Cameron*, 25 Okla. 256, 105 Pac. 189; *Lewis et al.* v. *Clements*, 21 Okla. 167, 95 Pac. 769; *Guthrie* v. *Nix, etc., Co.*, 3 Okla. 136, 41 Pac. 343; *Farris* v. *Henderson*, 1 Okla. 384, 33 Pac. 380.

The judgment of the lower court is reversed, and the cause remanded, with instructions to grant a new trial in accordance with this opinion. All the Justices concur."

Grissom v. *Beidleman*, 129 Pac. 853.

It is therefore not necessary to decide in this cause whether the terms of Section 22 of the Act of April 26, 1906, applies to an allotment selected after the death of the allottee. The minority of the Indian ward is such a disability or restriction under the laws of the United States and under the public policy of the Government and the State of Oklahoma in dealing with Indian minors that no conveyance of the real estate of said Indian ward is valid unless made in the manner prescribed by law.

The law prescribes only two methods by which said lands can be alienated:

First: By the ward himself after he has attained his majority, as defined by the Federal Statutes.

Second: Prior to such majority such alienation can be effected only by a conveyance made with the approval of the probate court having jurisdiction, after compliance with the necessary prerequisites for the sale of said minor's lands by a guardian.

The Indian treaties and acts of Congress specifically recognize said public policy and make the conveyance of any minor citizen of the Five Civilized Tribes as to any land of any of said Nations owned by him, whether acquired by allotment or inheritance, void unless made with the approval of the probate court having jurisdiction of his estate.

We therefore submit that under the public policy of the State of Oklahoma and the United States, a court of equity is without power to make a decree which amounts to a violation or evasion of said rule of public policy relative to the estate of a minor Indian citizen. Therefore, it is not material whether said lands were restricted in the hands of an adult heir pursuant to the terms of Section 22 of the Act of April 26, 1906. The disability of minority, although it may not be technically deemed a "restriction," is sufficient to render void any contract for the alienation of said minor's estate made without the approval of a proper court.

We insist that a contract of this character, under the law, falls into the same category with thousands of void deeds, powers of attorney, contracts of sale and other instruments made affecting the lands of Indians who were either under restriction or disability, and that this Court will not at this time reverse its policy of striking down such conveyances.

If Section 22 of the Act of April 26, 1906, is applicable, it is evident that under the terms of said Act, the approval of the United States court was necessary to the validity of any contract affecting the real estate of a minor.

We submit that the act itself, if properly punctuated, discloses conclusively that there is no foundation for plaintiff's claim. We call attention to said Section as it is ordinarily printed, as follows:

> "Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection had been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed *by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory,* then by a

proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

We suggest that, although it is evident under the foregoing punctuation that the Act specifically requires the approval of a court to every contract affecting a minor's real estate, still if the Act is properly punctuated, any possible doubt is removed. We suggest that the Act should be punctuated as follows:

"Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection had been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed *by the proper United States court for the Indian Territory, and in case of the organization of a State or Territory,* then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by

heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

This Court has held that the following is the proper rule of construction:

> "Punctuation is a minor and not a controlling element in interpretation (of a statute) and courts will disregard the punctuation of a statute, or re-punctuate it if need be, to give effect to what otherwise appears to be its purpose and true meaning."
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> *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84, 26 L. Ed. 1111;
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> *United States* v. *Lacher*, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080;
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> *Ford* v. *Delta, etc., Co.*, 164 U. S. 662, 674, 17 Sup. Ct. 230, 41 L. Ed. 590;
>
> *United States* v. *Oregon, etc., R. R.*, 164 U. S. 526, 541, 17 Sup. Ct. 165, 41 L. Ed. 541;
>
> *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 480, 19 Sup. Ct. 722, 43 L. Ed. 1041;
>
> Sutherland, Statutory Construction, Sec. 232.

It is evident under the foregoing punctuation that a guardian appointed by the United States court for the Indian Territory, or in case of the organization of a state or territory, appointed by a court of the county in which the minor or minors

may reside, or in which the real estate is situated, may sell an interest in the minor's real estate upon an order of such court made upon petition filed by a guardian. This is a logical and proper construction of the Act. It is impossible to find a statute of any state or territory of the United States or any Federal statute which authorizes a guardian to sell his ward's real estate without the approval of the court having jurisdiction of said estate. It is not conceivable that Congress intended the guardian to have power to sell his ward's interest in the land referred to in Section 22 *without the approval of the United States Court* prior to statehood and *with the approval of the County Court thereafter.* No possible reason can be assigned for such a distinction. The Act plainly provides in both cases, before statehood and after statehood, the approval of a court must be had before such sale is valid. In case the sale is made before statehood, the United States court having jurisdiction of the minor's estate must approve the sale. If the sale is had after statehood, the court having jurisdiction of the minor's estate by reason of his residence or the situs of his land must approve the sale. No authority is cited by plaintiff in error for his contention and it is evident that said contention is entirely lacking in substance as well as substantial merit.

> "Absurd or unjust results will never be ascribed to the legislature, and it will not be

presumed to have used inconsistent provisions as to the same subject in the immediate context."

Case of the Chinese Laborers, 13 Fed. 291.

The fact that the plaintiff in error, who was a practicing attorney at the time, contracting with a minor client, did not obtain the approval of a United States court to said contract indicates sufficiently that no court would have approved the same in a direct application for such approval.

Plaintiff in error evidently feels that a decision in his favor would set a most dangerous precedent and might subject the lands of minors in the State of Oklahoma to serious risk. He therefore suggests "that it is probable that there is no other contract now in force made in the Indian Territory affecting allotted lands inherited by Indian minors, and that the decision in this case will be upon an isolated point." We earnestly say to the Court that every possible device has been employed to cloud the title to lands of Indians in the Five Civilized Tribes, including the lands of minors. There is no assurance whatever that there are not many thousands of old contracts, bills of sale, powers of attorney, deeds of trust, and contracts for employment of attorneys taken from ignorant or dishonest guardians which have not and never could receive the sanction of any court. If it should be held

that such contracts are valid and enforcible, we have no doubt that numbers of them would at once appear.

Proposition III.

That the Court Has No Jurisdiction of This Cause Under the Terms of Section 237 of the Judicial Code, R. S., Sec. 709, Act March 3, 1911, c. 231, Sec. 237, 36 Stat. 1156, as Amended by Act of December 23, 1914, Chapter 2, 38 Stat. L. 790.

For the purpose of demonstrating the foregoing proposition we call attention to the following *verbatim* copy of extract from brief of plaintiff in error:

> "The Act of April 26, 1906, (34 Stat. at L. 137), particularly section 22 of said Act, did not intend to and did not reimpose restrictions upon lands allotted under section 20 of the Cherokee Agreement, and the defendant in error, Daniel S. Burgess, through his legal guardian could as freely alienate or bind for legal services his interest in the allotment of his father as he could non-tribal lands on May 11, 1906, and that said section 22 continued restrictions upon inherited tribal lands only where the allottee had selected for allotment his interest in the tribal lands or had received patent for such interest.
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> *Tiger* v. *Western Investment Co.*, 221 U. S. 286;
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> *Mullen* v. *United States*, 224 U. S. 448;
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> *Bartlett* v. *United States*, 235 U. S. 72, and
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> *Atkins* v. *Arnold*, 235 U. S. 417;

Woodard v. *DeGraffenried*, 238 U. S. 284;
Greenlees v. *Morris*, 239 U. S. 626;
Sunday v. *Mallory*, 237 Federal Rep. 526;
Welty v. *Reed*, 231 Federal Rep. 930;
Shulthis v. *McDougal*, 170 Fed. 529."

It is our view that if Section 22 of the Act of April 26, 1906, is inapplicable to the contract sued on, that this appeal should be dismissed.

Plaintiff in error specifically makes the contention that said Act does not apply to this controversy.

The Arkansas statutes governing the sale of estates of minors put in force in the Indian Territory are local laws and this Court will not review the same.

If the contention of plaintiff in error is not correct and the Act of April 26th is applicable, then the judgment of the Supreme Court of Oklahoma should be affirmed, although the record may show that technically this Court has jurisdiction, because it is manifest that the appeal was taken for delay only.

If the lands were free from the restriction of Section 22 of the Act of April 26, 1906 (that is, if Section 22 is not applicable), then the local laws in force in the Indian Territory governing the

estates of minors were controlling and no question is presented for review to this Court.

The case of *Patsy Perryman et al.* v. *Peggy Woodward*, 238 U. S. 148, 35 Sup. Ct. 830, 59 L. Ed. 1242, lays down the principle that if the controversy concerns the construction of an Arkansas act admitted to be in force in the Indian Territory, it would be treated as involving only a local law. See *Shulthis* v. *McDougal*, 225 U. S. 561, 571, 56 L. Ed. 1205, 1211, 32 Sup. Ct. Rep. 704; *United States* v. *Pridgeon*, 153 U. S. 48, 53, 54, 38 L. Ed. 631, 633, 634, 14 Sup. Ct. Rep. 746.

We call attention to the Act of April 28, 1904, 33 Stat. L. 573, which was in force at the time of the execution of said contract. Section 2 thereof is as follows:

> "All laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise. The sum of $20,000.00 is hereby appropriated out of any money in the treasury not otherwise appropriated for the payment of salaries of the judges hereby authorized, the same to be immediately available."

It cannot be disputed that under the laws of Arkansas in force and effect in the Indian Territory, a contract for the sale of a minor's interest in real estate was void unless approved by the probate court having jurisdiction. See *Robinson et al.* v. *Long Gas Company et al.*, 221 Fed., pages 398-402. That part of the opinion applicable is as follows:

> TRIEBER, District Judge (after stating the facts as above). Section 30 of the Act of Congress of May 2, 1890 (26 Stat. 94, c. 182), divided the Indian Territory into three judicial divisions, there being only one district for the entire territory. Section 31 of that act adopted for the territory certain laws of the state of Arkansas, digested in Mansfield's Digest, and among them those in relation to the administration of the estates of deceased persons and minors, and also provided that the courts of the Indian Territory should possess the powers of courts or probate under the laws of the State of Arkansas as they appear in Mansfield's Digest. Section 32 further provides:
>
> "The word 'County,' as used in any of the laws of Arkansas which are put in force in the Indian Territory by the provisions of this act, shall be construed to embrace the territory within the limits of a judicial division in said Indian Territory; and whenever in said laws of Arkansas the word 'county' is used, the words 'judicial division' may be substituted therefor, in said Indian Territory, for the purposes of this act."

Section 2 of the act of April 28, 1904, (33 Stat. 573, c. 1824) provides that:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise."

The act of March 1, 1895, established three districts for the territory, abolished the divisions which were created by the act of May 2, 1890, and vested in the district courts the same territorial jurisdiction which the dvisions had theretofore. The act of March 3, 1905 (33 Stat. 1060, c. 1479), contains a provision that:

"No lease made by any administrator, executor, guardian, or curator shall be valid or enforcible without the approval of the court having jurisdiction of the proceedings."

The provisions of Mansfield's Digest applicable to leases and sales of property of minors are as follows:

"Sec. 3502. The probate court shall order the proper education of minors according to their means, and for that purpose may, from time to time, make the necessary appropriations of the money or personal estate of any minor, and when the personal estate shall be insufficient or not applicable to the object,

upon application the court may order the lease or sale of real estate, or so much thereof as may be requisite, or that the same be mortgaged for not less than two-thirds of its real value, to raise the funds necessary to complete the education of such minor."

"Sec. 3506. Whenever any guardian or curator shall sell any real estate belonging to his ward under an order of court, he shall report such sale to the court ordering the same in the same manner as executors and administrators are required by law to report sales of real estate made by them for the payment of debts; and such sale, if approved by said court, shall be valid to all intents and purposes. If the court refuse to approve the report, the order of sale shall thereupon be renewed, and the same proceedings shall be had as upon the original order."

"Sec. 3509. When it shall appear that it would be for the benefit of a ward that his real estate, or any part thereof, be sold or leased and the proceeds put on interest, or invested in productive stocks, or in other real estate, his guardian or curator may sell or lease the same accordingly upon obtaining an order for such sale or lease from the court of probate of the county in which such real estate or the greater part thereof shall be situate."

"Sec. 3510. To obtain such order, the guardian or curator shall present to the court a petition setting forth the condition of the estate and the facts and circumstances on which the petition is founded."

"Sec. 3511. If, after a full examination on the oath of creditable and disinterested wit-

nesses, it appears to the court that it would be for the benefit of the ward that the real estate, or any part of it, should be sold or leased, the court may make an appropriate order for such sale or lease, under such regulations and conditions, subject to the provisions of this chapter in relation to the sale of real estate of minors, as the court shall consider suited to the case, first requiring the guardian or curator to enter into good and sufficient bonds to make such leases and conduct such sales with fidelity to the interest of his ward, and faithfully to account for the proceeds of such sales and leases according to law and as the order of the court may require.

* * * * * * * *

(2) In addition to what has been said, it is important to notice that the construction placed upon the sections of Mansfield's Digest, hereinbefore set out, by the Supreme Court of the State of Arkansas before these statutes were adopted for the Indian Territory, had been uniform that a deed or lease by the guardian of a minor, without approval by the probate court having jurisdiction of the subject-matter, is void, and that no title or estate passed until it was confirmed by the court. *Guynn* v. *McCauley*, 32 Ark. 97; *Reid* v. *Hart*, 45 Ark. 41; *Ambleton* v. *Dyer*, 53 Ark. 224, 13 S. W. 926; *Alexander* v. *Hardin*, 54 Ark. 480, 16 S. W. 264. All of these cases had been decided by the highest court of the state of Arkansas prior to the adoption of these statutes for the Indian Territory. The law is well settled that, when a statute of another state is adopted, the presumption is that the construction which had been theretofore placed upon it by the

highest judicial tribunal of the original state is adopted with it. *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; *Willis* v. *Eastern Trust & Bank Co.*, 169 U. S 295, 18 Sup. Ct. 347, 42 L. Ed. 752; *Henrgetta M. & N. Co.* v. *Gardner*, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. Ed. 637; *J. M. Robinson & Co.* v. *Belt*, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65; *Maki* v. *Union Pacific Coal Co.*, 187 Fed. 389, 109 C. C. A. 221; *Blaylock* v. *Muskogee*, 117 Fed. 125, 54 C. C. A. 639; *Harrill* v. *Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153.

* * * * * * * *

(3) The fact that the divisions of the court as originally provided in the act establishing a United States Court in the Indian Territory were abolished by the act of March 1, 1895 (28 Stat. 693), and three districts established in lieu of them, made the latter the successors of the former, and the word 'division' must be treated as amended to read 'district.' If, as contended by counsel for appellees, the change from divisions to districts deprived the district courts of all jurisdiction in those matters, then the provision of the act of 1905 requiring the approval of the court exercising probate jurisdiction would be meaningless. As the act of 1905 was enacted after the change from divisions to districts had been made, it clearly shows that the intention of Congress was to invest the district courts with such jurisdiction."

Robinson et al. v. *Long Gas Co. et al.*, 221 Fed. pp. 398-402.

The foregoing case details and construes the laws in force and effect in the Indian Territory relative to the estates of minors.

A reading of the case makes it evident that a contract such as the one in controversy, made without the approval of the United States Court sitting in probate, is void.

Therefore, it is evident that the decision of the Supreme Court of Oklahoma is right in any event whether Section 22 of the Act of April 26, 1906, is applicable to this controversy or not.

It is plain that plaintiff's amended petition under no theory states or can state a cause of action affecting the minor's real estate. Therefore, there is no real federal question involved in this appeal and the Court has no jurisdiction of the same. The federal question raised and argued is wholly fictitious and the decision thereof is not necessary to a decision of this cause.

The Supreme Court of Oklahoma has consistently held that Section 22 of the Act of April 26, 1906, is applicable to allotments selected after the death of the allottee, as well as to those selected during the allottee's lifetime.

Sampson v. *Staples*, 155 Pac. 213 (Okla.) not yet officially reported;

Brader v. James, 154 Pac. 560 (Okla.) not yet officially reported;

Moffet v. *Conley*, 163 Pac. 118 (Okla.) not yet officially reported.

The United States District Court for the Eastern District of Oklahoma and the Circuit Court of Appeals of the Eighth Circuit have held to the contrary. The case of *Sunday* v. *Mallory*, decided by the Circuit Court of Appeals of the Eighth Circuit on the 4th day of September, 1916, has been appealed by the representatives of the government to this Court. The question relative to Section 22 of the Act of April 26, 1906, is squarely presented in said appeal in said cause.

We say, therefore, that said question should be decided upon the hearing of said cause which presents a substantial controversy relative thereto. The appeal in this case does not present any such controversy relative to said statute and does not present any real federal question. Therefore, said appeal should be dismissed.

We reiterate the following general rules laid down by this Court:

> "A real and not a fictitious federal question is essential to the jurisdiction of the United States Supreme Court over the judgments of state courts. *Pennsylvania Co.* v. *Donat*, (1915) 239 U. S. 50, 36 S. Ct. 4; *Chicago, etc., R. Co.* v. *Devine*, (1915) 239 U. S. 52, 36 S. Ct. 27.

The existence of jurisdiction to review depends not merely upon form, but upon substance; power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous. *Seaboard Air Line Ry.* v. *Pargett*, (1915) 236 U. S. 608, 35 S. Ct. 481, 59 U. S. (L. ed.) 777.

A federal question based upon frivolous grounds will not give the Supreme Court jurisdiction to review a judgment of a state court. *Overton* v. *Oklahoma*, (1914) 235 U. S. 31, 35 S. Ct. 14, 59 U. S. (L. ed.) 112; *Erie R. Co.* v. *Solomon*, (1915) 237 U. S. 427, 35 S. Ct. 648, 59 U. S. (L. ed.) 1033.

"Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision. And to be effective for this purpose, the assertion of a Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of this court invoked merely for purposes of delay." *Parker* v. *McLain*, (1915) 237 U. S. 469, 35 S. Ct. 632, 59 U. S. (L. ed.) 1051.

1916 Supp. Fed. Sts. Ann. "Fictitious Question," p. 600.

We think that the foregoing argument and the authorities cited demonstrate:

I.

That a Recovery by Plaintiff is Conclusively Barred by the Facts Set Forth in His Own Statement.

II.

That the Decision of the Supreme Court of Oklahoma on the Question Raised Relative to Section 22 of the Act of April 26, 1906, 34 Stat. L. 137, Referred to in the Decision of That Court, is Right.

III.

That the Court Has No Jurisdiction of This Cause Under the Terms of Section 237 of the Judicial Code, R. S. Sec. 709, Act March 3, 1911, c. 231, Sec. 237, 36 Stat. 1156, as Amended by Act of December 23, 1914, Chapter 2, 38 Stat. L. 790.

We ask the Court to bear in mind that the lands involved constitute the inheritance of a minor Cherokee Indian. Said minor was the ward not only of his guardian, Nora B. Burgess, but was also the ward of the United States Court sitting in the Indian Territory and the ward of the United States Government as well. The Government, by its settled policy, has declared that said inheritance shall

not be taken from said minor by any guise or form of law without the approval of a proper court after an examination as to the adequacy of the consideration.

No opportunity has been given to any such probate court to make such examination. The complainant in this suit attempts to assert a lien against the Indian minor's inheritance received by him from the Cherokee tribe as the allotment of his deceased father by reason of the contract signed by said minor's guardian. We assert that this statement is sufficient to dispose of this case without argument.

We further assert that no decision involving the facts herein stated has been presented by the plaintiff in error and that no decision substantiating his contention can be presented. This Court is therefore asked to lay down a new rule to disturb and make unstable titles involving the estates of minors in the State of Oklahoma.

Plaintiff in error, to sustain his contention that his petition states a cause of action, presented to the Supreme Court of Oklahoma authorities such as the case of *In re Application of Hynes, General Guardian, etc.*, 12 N. E. 60 (Court of Appeals of New York).

This case arose on the petition of Mary Eliza Hynes, the mother of certain infants, asking leave

of the Supreme Court of New York to sell the interest of said infants in certain real property therein described for the purpose of paying from the proceeds thereof an indebtedness to Charles Todd, of St. Louis, Missouri, and an indebtedness to John L. Brower, their attorney and counsel. The court submitted said claims to a referee, who reported thereon.

Pursuant to said reference the court fixed the amount of Brower's compensation and ordered sale of the minors' real property to pay it.

It will be seen that in the foregoing case the claim of the attorney was presented to the court having jurisdiction of the minors' estate, and that all that was involved was the amount of money to be allowed from the estate in payment of said claim. The court's statement sets forth the facts on which suit was brought:

> "Brower's claim was based upon an agreement dated November 24, 1875, made by Mrs. Mary Eliza Hynes, the mother of said infants, individually and as their general guardian, by which, after reciting the commencement by Brower of proceedings to recover property of the individual, she, for and in consideration of the assistance and service of Brower in attempting to recover the property aforesaid, agreed to pay to him *a sum of money equal to one-third (1-3) of the value* of all of the

said property recovered and restored to her and her said children."

In re Application of Hynes, General Guardian, etc., 12 N. E. 60 (Court of Appeals of New York.)

It will be seen that the agreement in the case above cited is wholly dissimilar to the contract sued on, the contract sued on being for an interest in the minors' real property which was vested in him and the contract in the Hynes case being a straight agreement to pay him a fee in money, the amount to be based upon the value of the recovery.

A contract similar to the Hynes contract was presented to this court in the case of *Taylor* v. *Bemis,* 28 L. Ed. 64 (also cited by plaintiff in error to the Supreme Court of Oklahoma).

In that case the widow entered into the contract in question as tutrix (as well as individually) for the recovery of a certain claim against the United States which was paid in cash. This case did not involve real property of a minor.

The case of *In re Kitchen,* 89 N. E. 375 (Appellate Court of Indiana) cited by plaintiff in error to the Supreme Court of the State of Oklahoma holds:

* * * * * * * *

"A guardian cannot claim credit for the entire payment to an attorney for services to the estate, though made according to the con-

> tract with the attorney, the contract for payment of half the proceeds of the estate not having been approved by the court, having been unreasonable, and having been made without the guardian knowing, or making effort to learn, the condition of the estate."

The complainant failed to disclose any authority to the Supreme Court which permitted the recovery of an interest in the real estate of a minor. He has not seen fit to press his contention that the contract is enforcible in this court, and he has not asserted to this court that said contract is enforcible or that his petition states facts sufficient to constitute a cause of action against the minor defendant.

Therefore, the appeal is fictitious because the petition does not state a cause of action and cannot sustain a federal question.

An objection was made to the insufficiency in the petition in the trial court on the ground that said petition failed to state facts sufficient to constitute a cause of action (record, pages 6 and 7). The court dismissed the suit and its judgment was affirmed by the Supreme Court of the State. The law of the case is stated in the syllabus of the opinion of the Supreme Court of Oklahoma (record, page 11). The Supreme Court's decision is based upon two grounds, as set forth in the syllabus.

First: The contract of sale is void for the rea-

son that it was made without the approval of any court.

Second: A sale under the terms of Section 22 of the Act of Congress of April 26, 1906, could only be accomplished through the action of a guardian duly appointed by the proper United States Court for the Indian Territory * * * upon the order of such court made by petition filed by guardian.

The trial court and the Supreme Court of Oklahoma specifically considered plaintiff's amended petition and found that it did not state a cause of action. However, this court could notice the invalidity and insufficiency of said petition if objection to the same were raised for the first time on this appeal. *Slacum* v. *Pomery*, 6 Cranch. 221, 3 Law. Ed. 205.

A great quantity of minors' lands have been sold through the probate courts of Oklahoma. These sales have been supervised by the representatives of the Secretary of the Interior under the terms of the Act of May 27, 1908. The purchasers at such sales have relied upon the settled policy of the Government of the United States and the State of Oklahoma to strike down all contracts made by the minor or by his guardian, the effect of which was to convey the real estate of minors.

We respectfully submit that this rule of public policy has become in effect a rule of property in

the State of Oklahoma, and that a departure therefrom at this time would work a most serious inconvenience and hardship not only on Indian minors but upon a vast number of innocent purchasers of lands similar to those involved in this controversy.

Respectfully submitted,

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AND
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